United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

F033

JOINT APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,169

ROBERT L. DUNN,
Executor of the Estate of
RUTH E. HOOVER,
Deceased,

Appellant,

v.

WILLIAM J. MARSH,
Executor of the Estate of
MARGARET V. MARSH,
Deceased,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Washington, D. C. · THIEL PRESS · 202 · 393-0625

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILLIAM J. MARSH
Executor of the Estate
of MARGARET V. MARSH, Deceased
7502 Glenside Drive
Takoma Park, Maryland
Plaintiff,

v.

ROBERT L. DUNN
Executor of the Estate
of RUTH E. HOOVER, Deceased
12823 Lacy Drive
Silver Spring, Maryland
Serve:
Register of Wills for the
District of Columbia
Constitution Avenue and
John Marshall Place, N.W.
Washington, D.C.
Defendant.

Civil Action No.
2791-'64

RELEVANT DOCKET ENTRIES

Nov. 10, 1964 – Complaint, appearance, jury demand.

Dec. 3, 1964 – Answer of deft. to complaint; c/m 12/2/64; appearance of Collins, Anderson, Ahern & Quinn. Filed.

Feb. 12, 1965 – Consent order granting pltf. leave to file amended complaint. (N) Matthews, J.

Feb. 16, 1965 – Amended complaint; jury demand; c/m 2/16/65. Filed.

Feb. 25, 1965 – Answer of deft. to amended complaint; c/m 2/24/65. Filed.

Feb. 14, 1967 – Pretrial proceedings.

May 22, 1967 – Note from jury. Filed.

May 22, 1967 – Questions for the jury. Filed.

May 22, 1967 – Verdict and judgment for pltf. v. deft. for $8,000.00 as to Count One of Amended Complaint; pltf. to take nothing as to Count Two of Amended Complaint. (N) Holtzoff, J.

May 31, 1967 – Motion of deft. for new trial; P&A; c/m 5-31-67; M.C. Filed.

June 2, 1967 – Motion of deft. for new trial denied. (FIAT) (N) Holtzoff, J.

June 20, 1967 – Notice of appeal by defendant from judgment of 5-22-67; copy to Stephen Boynton; Deposit $5.00 by Quinn. Filed.

[Filed Nov. 10, 1964]

COMPLAINT

(Action for Damages for Negligence Causing Death)

1. This Court has jurisdiction of this action pursuant to the provisions of Title 11 Sections 305 and 306, Title 20 Section 501 and Title 16 Section 1201 of the District of Columbia Code, 1961 Edition and the amount in controversy exceeds the sum of ten thousand dollars ($10,000.00).

2. Plaintiff, William J. Marsh, is the duly appointed and acting Executor of the estate of Margaret V. Marsh, deceased. He was so appointed on December 20, 1963 by the United States District Court for the District of Columbia holding a Probate Court in Administration case numbered 110,118. He is a resident of the State of Maryland.

3. Defendant, Robert L. Dunn, is the duly appointed and acting Executor of the estate of Ruth E. Hoover, deceased. He was so appointed on January 14, 1964 by the United States District Court for the District of Columbia holding a Probate Court in Administration case numbered 110,271. He is a resident of the State of Maryland.

4. On November 19, 1963, at about three o'clock P.M., plaintiff's decedent was a passenger in an automobile owned and operated by defendant's decedent in a southerly direction on Third Street, Northwest, approaching and into its intersection by Sheridan Street, Northwest, Washington, D.C. At that time and place, a vehicle of the Fire Department of the District of Columbia was responding to a fire alarm and was being operated by an employee of the District of Columbia in an easterly direction on Sheridan Street, Northwest, approaching and into its intersection by Third Street, Northwest, Washington, D.C. A collision occurred within the said intersection between the automobile owned and operated by defendant's decedent in which the plaintiff's decedent was a passenger and the vehicle of the Fire Department of the District of Columbia.

5. Said collision was caused by the operation of her automobile by defendant's decedent in a negligent and careless manner and in violation of the traffic laws of the District of Columbia then and there in effect.

6. As a direct and proximate result of the aforesaid negligence on the part of defendant's decedent, plaintiff's decedent suffered severe and multiple personal injuries. She was removed from the scene of the said collision to Providence Hospital, Washington, D.C., where she died at about 5:30 P.M. on said November 19, 1963 as a direct and proximate result of the personal injuries sustained by her in said collision.

7. The personal injuries sustained by plaintiff's decedent were such that, if death had not ensued, she would have been entitled to maintain an action and to recover damages therefor during her lifetime. No such action was instituted by her nor recovery of any damages therefor had during the lifetime of plaintiff's decedent.

8. Plaintiff's decedent left her surviving as her next of kin her adult sons whose names and addresses are the following:

a) William J. Marsh (plaintiff herein)
7502 Glenside Drive
Takoma Park, Maryland

b) Richard W. Marsh
606 Vierling Drive
Silver Spring, Maryland

9. These next of kin have sustained substantial pecuniary loss and damages as a result of the wrongful death of plaintiff's decedent, as aforesaid, and, additionally, the expenses of her last illness and burial, all in the amount of fifty thousand dollars. ($50,000.00).

Wherefore, plaintiff demands judgment against the defendant in the sum of fifty thousand dollars ($50,000.00), besides costs.

HOGAN & HARTSON

George D. Horning, Jr.
Frank F. Roberson
Attorneys for Plaintiff

Plaintiff demands trial by jury.

[Filed Feb. 16, 1965]

AMENDED COMPLAINT

(Survivor's Action and Wrongful Death Action)

Count One

As and for Count One of the complaint, the plaintiff, William Marsh, adopts and realleges paragraphs 1 and 9 of the original complaint.

Count Two

1. Plaintiff, William Marsh, realleges and adopts as allegations in this Count Two paragraphs 1 through 7 of the original complaint.

2. By virtue of the negligence of the defendant's decedent, the plaintiff's decedent was rendered disabled which

disability would have continued throughout her normal life span. This cause of action accrued to the plaintiff's decedent before her death and thus survives to her Estate under D.C. Code § 12-201 (1961 Ed.).

WHEREFORE the plaintiff demands judgment against the defendant for Fifty Thousand Dollars ($50,000) plus costs and interest and any other further relief as to the Court may seem proper.

HOGAN & HARTSON

David N. Webster
Attorney for Plaintiff

[Filed Feb. 25, 1965]

ANSWER TO AMENDED COMPLAINT

Defendant adopts by reference and realleges his Answer previously filed as his answer to the Amended Complaint Counts 1 and 2. Defendant further is without knowledge or information sufficient to form a belief concerning the damages alleged in paragraph 2 of Count 2 of the Amended Complaint and demands strict proof thereof and denies all further allegations contained in paragraph 2 of Count 2.

COLLINS, ANDERSON, AHERN & QUINN

Francis X. Quinn
Attorney for Defendant

[Certificate of Service, dated February 24, 1965]

[Filed Feb. 14, 1967]

PRE-TRIAL ORDER

Action for damages for wrongful death due to negligence under Survival Act.

THE PARTIES AGREE TO THE FOLLOWING STATEMENT OF FACTS AND STIPULATE THERETO:

The P is duly appointed and qualified administrator of the Estate of Margaret V. Marsh.

On November 19, 1963 at about 3 P.M. it was daylight, weather clear, roads dry. The P's decedent Margaret V. Marsh was a passenger at that time in a 1956 Dodge 4-door sedan owned and operated by D's decedent Ruth E. Hoover.

The D is the duly appointed and qualified executor of the Estate of said Ruth E. Hoover.

The aforesaid automobile was proceeding south on 3rd St., N.W., Washington, D.C. At the intersection of Sheridan St., the vehicle was involved in a collision with a Fire Dept. of D.C. truck which was being operated in an easterly direction on Sheridan St. Fire truck responding to local alarm.

Traffic on Sheridan St. was governed by a "Stop" sign.

THE PLAINTIFF CLAIMS that the collision and the injuries, death and damages described hereinafter, were caused by the negligence of and violations of D. C. Traffic regulations of the D's decedent Ruth V. Hoover, in that she failed to keep a proper lookout; failed to give full time and attention (99) (c); failed to yield right of way to an authorized emergency vehicle 50(a) and drove recklessly within the preview of Sec. 21(a).

INJURIES: Fractured ribs, a fractured pelvis, lacerated lung and bilateral hemothorax. As a direct and proximate result of the personal injuries sustained, P's decedent died at 5:30 p.m. on November 19, 1963.

P's decedent was self-supporting 68 year old widow at the time of her death. She was survived by two sons: William

J. Marsh and Richard W. Marsh, ages 38 and 43 respectively. Although not dependents, decedent made contributions to them from time to time.

CLAIMED LOSSES:

Providence Hospital	$150.00
Funeral Expense (Arlington Cemetery)	1,098.00
Loss of Contributions, gifts and support	
Personal Injury and disability	

The D denies all allegations of negligence and violations of traffic regulations; and asserts that the collision, all injuries and damages were caused by the negligence of and violations of traffic regulations by one Henry Walsh who was driving the D. C. Fire Truck; failure to yield right of way; excessive and/or unreasonable speed; failure to maintain a proper lookout; failure to devote full time and attention; failure to comply with regulations with regard to emergency vehicles.

D denies the nature and extent of the alleged injuries and damages claimed by P.

STIPULATIONS

Counsel for P shall furnish to the Clerk of Court and opposing counsel a written itemized statement of the contributions, gifts and support made by the decedent to her P son and other son for a period two years prior to the time of her death.

WITNESSES KNOWN to the PLAINTIFF are set out in the statement which is attached hereto, made a part hereof, incorporated herein by reference marked "A".

The parties agree to file with the Clerk of Court and to mutually exchange, on or before Feb. 24, 1967, a list of the

names and addresses of any witnesses known to them, other than those listed herein, including medical and expert witnesses, who have knowledge of any aspect of this case, indicating those who may be used at the trial. Impeachment witnesses are not to be included.

Defendant knows of no other witnesses than those listed in P's pre-trial statement, with the addition of Officer George W. Thomas of A.I.U.

The following may be admitted in evidence without formal proof, subject to all legal objections: hospital records re decedent Marsh; HEW Mortality Tables; death certificate of Margaret Marsh, the D. C. Traffic regulations listed herein and those of which counsel advised opposing counsel and clerk of court on or before Feb. 24, 1967.

Counsel for P shall furnish the Clerk of Court and opposing counsel on or before Feb. 24, 1967 with a written statement which will indicate the nature and length of disability of conscious suffering which will be claimed on behalf of P's decedent at time of trial.

The Examiner has requested counsel to appear at trial with the maximum amount of authority to settle this case which will be allowed them by their principals.

Pretrial Examiner

Stephen Boynton, Esq., Atty. for P

Francis X. Quinn, Esq., Atty. for D

[Filed May 31, 1967]

MOTION FOR A NEW TRIAL

The defendant, Robert L. Dunn, executor of the estate of Ruth E. Hoover, by counsel, moves this Court for a new trial for the following reasons:

1. The instructions of the Court to the jury were erroneous and prejudicial to the defendant in that

a. The court erroneously instructed the jury as to the law with reference to emergency vehicles and vehicles subject to the emergency vehicle regulations.

b. The court's summary of the evidence in its instruction was prejudicial to the defendant.

c. The court erroneously suggested to the jury that the negligence of the fire truck operator was immaterial to this case, and all other considerations other than the negligence of the defendant were extraneous.

d. In response to a note from the jury during their deliberations the court erroneously re-instructed the jury as to gifts and contributions made by the deceased.

2. The conduct of the court in the trial of this case was prejudicial to the defendant.

COLLINS, ANDERSON, AHERN, QUINN & WYLAND

By
Francis X. Quinn
Attorney for Defendant
1750 Pennsylvania Avenue, N. W.
Washington, D. C.

[Filed May 22, 1967]

VERDICT AND JUDGMENT

This cause having come on for hearing on the 18th day of May, 1967, before the Court and a jury of good and lawful persons of this district, to wit:

Patricia T. Ball	Anita L. Lanigan
Sylvester A. Haynes	Charles A. Taylor
Nora Samen	G. Tang Woo
Mittie M. Capers	Ralph Holmes, Jr.
Margaret E. Calderon	Henrietta A. McNair
Virgil P. Crawley	Mrs. Mary J. Whitman

who, after having been duly sworn to well and truly try the issues between William J. Marsh, Executor of the Estate of Margaret V. Marsh, the plaintiff, and Robert L. Dunn, Executor of the Estate of Ruth E. Hoover, the defendant, and after this cause is heard and given to the jury in charge, they upon their oath say this 22nd day of May, 1967, they find the answers to the questions submitted as follows:

1. Was Ruth E. Hoover, the driver of the automobile, guilty of any negligence that was the proximate cause or one of the proximate causes of the accident?
   Answer *Yes.*
2. What amount of damages should be awarded the next of kin of Margaret V. Marsh for her death?
   Answer *$8,000.00.*
3. What amount of damages, if any, should be awarded to the estate of Margaret V. Marsh for the disabilities caused to her by the accident (without making any allowance for pain and suffering)?
   Answer *None.*

WHEREFORE, it is adjudged that said plaintiff recover of said defendant the sum of eight thousand dollars ($8,000.00), as to Count One of the Amended Complaint, an action for wrongful death brought pursuant to Title 11 Sections 305 and 306, Title 20 Section 501, and Title 16 Section 1201 of the District of Columbia Code (1961 Edition); and it is further,

ADJUDGED that plaintiff take nothing as to Count Two of the Amended Complaint, a survivorship action brought pursuant to the provisions of Title 12 Section 201 of the District of Columbia Code (1961 Edition).

Alexander Holtzoff
Presiding Judge

Robert M. Stearns,
Clerk

/s/ Herbert N. Haller
Deputy Clerk

[Filed June 20, 1967]

NOTICE OF APPEAL

Notice is hereby given this 20th day of June, 1967, that the defendant, Robert L. Dunn, Executor of the Estate of Ruth E. Hoover, Deceased hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 22nd day of May, 1967 in favor of William J. Marsh, Executor of the estate of Margaret V. Marsh, Deceased, against said Defendant.

Francis X. Quinn
Attorney for Defendant

PROCEEDINGS

[3-A] THE DEPUTY CLERK: Marsh vs. Dunn.

THE COURT: Will counsel come to the bench, please.

(At the bench:)

THE COURT: Gentlemen, have you explored the possibility of a settlement in this case?

MR. BOYNTON: Yes, sir.

THE COURT: How far have you progressed?

MR. BOYNTON: The last offer from the defendant to the plaintiff was $2,000 and our demand was ten, so we are quite far apart.

THE COURT: That doesn't mean anything. It is unusual to see your firm for the plaintiff in a personal injury action. What do you say?

MR. QUINN: Your Honor, there are some problems with this case with reference to what damages they can claim as a result of this death and I think this has been one of the problems with settlement in the case. Very frankly, my position is the plaintiff is entitled to recover assuming they carry the burden on liability, they are entitled to recover for her funeral bill, and I have considerable question as to anything beyond that. [3-B]

THE COURT: Why?

MR. QUINN: Two reasons. One is a claim that is being made for her disability. This woman lived two hours after this accident occurred.

THE COURT: Of course I don't think damages for two hours' disability would amount to very much. We have that unfortunate—some people think it is fortunate—statutory rule that you can't recover pain and suffering after the plaintiff dies. I think that is a unique provision. I don't believe there is any other state that has it. But what about the wrongful death claim?

MR. QUINN: In that claim, at the time of this woman's death I believe she was 68. Their doctor submitted a letter in which he suggested that her life expectancy would be from four to seven years. She also at the time of this accident had leukemia. The principal claim is the gifts and

contributions. I say that is, number one, speculative as to the amount of money that would have been given to her two children, who both admittedly were not dependent upon her in any way. They are both married, have their own jobs.

THE COURT: But that is sufficient to predicate a [3-C] claim for damages.

MR. QUINN: It is sufficient to predicate it, but then the question is what will proof provide.

THE COURT: If there is proof the decedent was accustomed to making certain gifts to her children, the mere fact that they are adults and have families of their own wouldn't preclude recovery.

MR. QUINN: I think that what you say is correct, except what is the pattern of these gifts that were given and to what extent they were given. From what has been submitted, I would think the most they ever could expect would be $1,000 a year and I don't concede that but I say as far as I am concerned this would be the maximum and admittedly a great portion of this was for the sons' children.

THE COURT: That wouldn't make any difference. I think perhaps there could be some middle ground.

MR. BOYNTON: I agree, and if I may respond to her leukemia, it is true she did have leukemia; however, the doctor's report evidenced she was in very good health and the type leukemia she had and in her advanced age, with proper care and treatment and taking care of herself, would not materially—

THE COURT: Haven't they developed in recent years treatments that prolong the life of patients suffering from leukemia?

MR. BOYNTON: It depends on what type it is, and quite frankly, I am not sure if that fits into this medical history or not.

THE COURT: To what extent are you willing to abate your figure?

MR. BOYNTON: The $2,000 figure that has been offered by the defendant is just the funeral bill and the

last hospitalization, which we feel under the facts we are entitled to more. We would be willing to settle this case for a reasonable figure.

THE COURT: What do you look upon as a reasonable figure?

MR. BOYNTON: Our feeling is we would not accept less than $7,000 in settlement of this, which we feel is a substantial reduction.

THE COURT: What about that?

MR. QUINN: No, Your Honor.

THE COURT: That doesn't seem unreasonable.

MR. QUINN: Your Honor, there is another hurdle in this case and that is the question of liability.

THE COURT: I haven't examined that very carefully because I thought you rather intimated the plaintiff's posi-
[3-E] tion was rather strong on that.

MR. QUINN: No, I don't feel that at all.

THE COURT: What do you say about liability?

MR. BOYNTON: Your Honor, we feel liability is very much weighted in favor of the plaintiff.

This accident occurred as a collision between a fire engine responding to a call and a car that drove in front of the fire engine. The car had the right of way if there hadn't been an emergency vehicle proceeding, but he had his lights on and his siren sounding.

Both the occupants of that car were killed. We don't know what happened but we do know that car drove right in the path of that fire engine.

THE COURT: Let me get the facts. The car was on Third Street going in a southerly direction and the accident occurred at the intersection of Sheridan Street?

MR. BOYNTON: The fire engine was proceeding in an easterly direction.

THE COURT: Well, it seems to me that is pretty good liability. If a motorist has a collision with a fire truck he has some explanation to make. It isn't one hundred percent liability but he has some explanation to make.

[3-F]

MR. QUINN: And unfortunately she isn't here to make the explanation.

THE COURT: Well, that is it. That is your weakness or your misfortune.

MR. QUINN: We also have the operator of the fire engine, who on various estimates from witnesses could have been going as much as 35 miles an hour when he entered that intersection. This intersection is controled by a stop sign. He has a stop sign.

THE COURT: The Fire Department?

MR. QUINN: Yes.

THE COURT: Was he going to a fire?

MR. QUINN: He was.

THE COURT: They can ignore stop signs.

MR. QUINN: Not to the extent of going right out at that speed. I think the regulation puts a burden on them. The regulation says they have to proceed with caution.

THE COURT: I know, but what constitutes caution differs under various circumstances.

I think you are whistling to keep your courage up.

MR. QUINN: No, I don't think so.

THE COURT: I don't mean that in any derogatory sense, of course.

[3-G]

I think there is pretty good liability, not a hundred percent.

How high are you willing to go?

MR. QUINN: At $7,000 I can't—

THE COURT: I am not interested, for the moment, in the plaintiff's figure. I am interested in your figure. How high are you willing to go?

MR. QUINN: As I told Mr. Boynton, I said the $2,000 figure was a figure that I would be willing to recommend to my company providing the case could be settled. If it can't be settled, I have not talked with them about any more money than that.

THE COURT: I am not suggesting that you commit your company or your people. What are you willing to

recommend to them if the matter can be settled this afternoon?

MR. QUINN: I would recommend, my top figure as far as what I would recommend, would be another $1,000. I wouldn't recommend any more than $3,000. That is only a recommendation.

THE COURT: What about $5,000?

Would you take that?

MR. BOYNTON: I believe not, Your Honor. In thorough discussion with my client earlier this morning we

[3-H]

decided that $7,000 would be the least amount we would accept.

THE COURT: Those situations are always fluid.

MR. BOYNTON: I would be happy to talk to my client, who is here in the courtroom.

THE COURT: I am not going to ask you to talk to your client. That is your decision.

Would you be willing to recommend $5,000?

MR. QUINN: No, Your Honor.

THE COURT: Well, there is no use your talking to your client, unless you want to talk about some smaller figure.

MR. BOYNTON: No, Your Honor, I feel not.

THE COURT: I think we better impanel a jury and start.

Will you bring in the jury panel. In the meantime we will take our mid-afternoon recess.

(Recess.)

[3]

THE COURT: We will proceed to impanel a jury.

(A jury of 12 and 1 alternates was impaneled and sworn.)

THE DEPUTY CLERK: All witnesses in the case of Marsh v. Dunn please accompany the Marshall to the witness room.

THE COURT: Will counsel come to the bench, please.

(AT THE BENCH:)

THE COURT: Gentlemen, the pretrial order is not quite complete. Perhaps it couldn't be made more complete, but, anyway, it isn't.

It is submitted that there was a collision between the two vehicles in the intersection. There is no statement as to which vehicle struck which.

What do you claim, Mr. Boynton, as to which vehicle struck which?

MR. BOYNTON: The fire engine did strike the automobile that was in its path.

THE COURT: You claim that the fire truck struck the automobile?

MR. BOYNTON: Yes.

MR. QUINN: Yes, that is correct, Your Honor.

THE COURT: Very well. Thank you. May I make this [4] inquiry: Did the automobile try to slow down or stop?

MR. QUINN: We don't know.

THE COURT: Of course the driver is dead.

MR. BOYNTON: We will have testimony that it did not.

THE COURT: Is there any relation between the two deceased?

MR. BOYNTON: Just friends.

MR. QUINN: They were friends for a number of years.

THE COURT: Very well. How long will your opening statement take?

MR. BOYNTON: Less than ten minutes.

THE COURT: Very well.

(IN OPEN COURT:)

THE COURT: Ladies and gentlemen of the jury, before we begin this trial I should like to remind you, please, that from this moment on and until after the trial is finished you must not discuss this case with anyone, not even at home with members of your families. You must not discuss it even amongst yourselves until the trial is finished and the matter is submitted to you for final decision. You must not let anyone speak to you about it and if anyone should try to you must report the matter to the Court.

And please keep an open mind until the trial is [4-A] finished and the matter is submitted to you for final decision.

(Counsel for plaintiff and defendant made opening statements.)

THE COURT: Ladies and gentlemen of the jury, we are going to recess this trial at this time until 10 o'clock tomorrow morning. You will be excused at this time and please be back in the courtroom a few minutes before 10 o'clock tomorrow morning.

(At 3:50 p.m. trial stood in recess, to reconvene 10:00 a.m., May 19, 1967.)

[5] (Washington, D.C.; May 19, 1967)

[6] PROCEEDINGS

THE COURT: Mr. Boynton, I believe you had a police witness here yesterday. I suggest that you call him first so that he can be released.

MR. BOYNTON: Your Honor, realizing the schedule, yesterday, I excused him until 10:30 this morning, so I don't believe he is here yet.

THE COURT: I see. You may proceed.

MR. BOYNTON: I would like to call Mr. Henry Vincent Walsh.

HENRY V. WALSH

called as a witness by Plaintiff, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BOYNTON:

Q. Would you please state your full name and address? A. Henry Vincent Walsh, 225 Rock Creek Church Road, Northwest, Washington, D.C.

Q. Are you presently employed, Mr. Walsh? A. No, I am retired from the D.C. Fire Department.

Q. How long were you with the District of Columbia Fire Department prior to retirement? A. A little over 30 years.

[7] Q. And when was your retirement? A. The first of this month, the first of May.

Q. Mr. Walsh, during your work with the District of Columbia Government what were mainly your duties that period of time?

THE COURT: He was a member of the Fire Department, wasn't he?

MR. BOYNTON: Yes, Your Honor.

THE COURT: Very well. We know what a fireman does.

BY MR. BOYNTON:

Q. Did your duties entail driving? A. Yes, I drove most of the time.

Q. What type of equipment did you drive? A. I drove pumpers, rescue squad, and I was with the rescue squad ambulance for 12 years.

Q. In November 1963 what section of the District of Columbia Fire Department were you attached to? A. 22 Engine, 5760 Georgia Avenue, Northwest.

Q. Directing your attention to November 19, which was a Tuesday, 1963, did you have an occasion to respond to a local fire alarm at approximately 3 p.m.? A. Yes, I did.

Q. What was the first thing you did in responding to [8] that fire alarm in the quarters? A. Well, we start the motor, turn the radio and switch the master switch for your headlights and red light.

Q. How many engines responded to that fire alarm? A. Two, hose wagon and pumper.

Q. What were you driving? A. Pumper, second.

Q. In responding to that call did you have an occasion to drive on Sheridan Street, Northwest? A. Yes, I did.

Q. Are you familiar with that street? A. Very much so, yes.

MR. BOYNTON: Your Honor, defense counsel and I have stipulated that this drawing on the blackboard is a fair representation of the area in question.

THE COURT: Very well. That will be very helpful, I am sure. Suppose you move it forward a bit. We want every member of the jury to be able to see the blackboard. If

any of you have any difficulty seeing what is on the blackboard, would you mind raising your hand and then we will shift it to a different position.

BY MR. BOYNTON:

Q. Mr. Walsh, looking at this blackboard drawing which [9] notes Sheridan Street and Third Street, North Dakota Avenue and Rittenhouse Street, what direction were you proceeding on Sheridan Street? A. I was proceeding east; that is, from the left across, from the left to the right on the board there.

Q. And you mentioned that there were two engines responding to this call. Where were you in relation to the other engine? A. You mean how far? I was the second in line, about half a block back.

Q. Is that normal procedure? A. Yes.

THE COURT: What was your answer?

THE WITNESS: I was second in line. The wagon was in front and I was in back approximately about a half a block. The Fire Department regulations –

MR. QUINN: Your Honor, I don't –

THE COURT: No, don't address the Court from the other side of the courtroom.

MR. QUINN: Your Honor, the witness –

THE COURT: Just what are you trying to say?

MR. QUINN: I am going to object, Your Honor.

THE COURT: On what ground?

[10] MR. QUINN: On the grounds the witness is now attempting to state the normal –

THE COURT: State your objection in legalistic phraseology instead of making an argument. What is your objection? On the ground that.

MR. QUINN: My objection is on the ground that he is giving an opinion or statement of the rules of the Fire Department.

THE COURT: Objection overruled. Will you read the pending question?

(The Reporter read the question as follows: "And you mentioned that there were two engines respond-

ing to this call. Where were you in relation to the other engine?")

THE COURT: You say the two vehicles were about a half a block apart?

THE WITNESS: I was about a half block back of the first one.

BY MR. BOYNTON:

Q. Would you describe, Mr. Walsh, the physical characteristics surrounding this intersection? You stated, I believe, that you were familiar with this intersection.

THE COURT: I think you better make your question [11] a little more specific.

BY MR. BOYNTON:

Q. Referring to the drawing, Mr. Walsh, proceeding in an easterly direction on Sheridan Street what would be immediately to your left? A. Well, there is a school on the left, and on Third Street there on the left side going north is a high hedge, I think it's forsythia, and on the southeast corner –

THE COURT: On which corner was the school?

THE WITNESS: On the north side.

THE COURT: Northeast or northwest?

THE WITNESS: Northwest.

THE COURT: Northwest corner?

THE WITNESS: Yes. Then on the southwest corner, that is down in the left, there is a row of buildings there that extends right out very close to the curb line, I'd say maybe 8 or 10 feet, which makes it a very dangerous intersection. Of course, the other side, it's open.

BY MR. BOYNTON:

Q. Referring to the northwest corner of Sheridan and Third Street you mentioned that there was a school there. Is there an open area in front of that school? A. Yes, it is, very much.

[12] Q. How far, going in a westerly direction up Sheridan Street, is the school located from the corner? A. Well, between Third and Fifth. Fourth Street don't go through, it becomes a dead-end at Sheridan Street. There is Third

to Fourth on the south side and there is Third to Fifth on the north side. I'd say the school starts about Fourth and goes to Fifth.

Q. Is the area between the school and Third Street open? A. Open except for the shrubbery along Third Street.

Q. Mr. Walsh, how fast were you traveling while you were going down Sheridan Street? A. I'd say approximately 25 miles an hour. I was slowing down as it is a hill there, downgrade. I was mostly braking coming down and as I entered the intersection I braked more.

Q. Was your siren on at the time? A. Yes.

Q. Was your dome lights? A. Dome lights and headlights.

Q. Would you please describe what happened as you came down Sheridan Street towards the intersection of Third [13] Street? A. Well, as I came down I was looking both ways. I looked left and I saw nothing. I looked right and saw nothing. And as I approached the intersection I looked left again and there is this car was bearing right down on me from the left.

THE COURT: Speak a little slower so that everyone can grasp what you are saying. Some of the jurors are quite a distance away from you.

THE WITNESS: As I approached the intersection, after I looked the second time both ways, this car come from the left, that is, coming south on Third Street, and I saw it bearing down on me and I figured I couldn't get stopped so I tried turning to the right. I put my brakes on and turned to the right but they just kept coming and there was nothing I could do.

BY MR. BOYNTON:

Q. Did the car make any effort to avoid the accident? A. No, they just come right straight through; didn't swerve or anything.

Q. Where was the car when you first saw it? A. I'd say it was about 25 feet to my left, coming down Third Street.

Q. Could you estimate the speed of that automobile at [14] that time? A. I couldn't say for sure, no.

Q. What happened then? A. I say I tried to put on my brakes and turn to the right, but there was nothing I could

do. This car kept coming straight at me in my path.

Q. Referring to the first fire engine, do you know whether –

THE COURT: Hadn't you better bring this to an end? What happened?

BY MR. BOYNTON:

Q. Would you state the conclusion of what happened after you put on the brakes and turned to the right? A. Well, we had this collision. I was momentarily knocked unconscious. When I regained consciousness I heard this man asking me how do you cut your siren off.

Q. Where did your engine come to rest? A. Just around the corner, just about half-way turning south, just approximately around the corner, as far as I can remember.

Q. You are speaking of the southwest corner of Third? A. Southwest corner.

Q. Do you know where the automobile came to rest? [15] A. The automobile came to rest on this corner right over this point on the south – I think that is a little further down than what it shows there.

Q. This would be the corner of North Dakota and Third Street? A. That is right.

Q. Is that the point you are speaking of? A. The southeast corner there, right on that point there.

Q. Referring to the first fire engine, do you know whether or not it had a siren going at the time it was driving down? A. I am sure it did, but you can't hear one over the other. I couldn't hear his over mine because I am right on top of mine.

Q. Do you know whether or not it had its dome light on or its flashing light? A. I am pretty sure it did. That is one of the first things you do before you leave the house, you automatically turn the red light and headlights on.

Q. Do you recall whether or not there were any automobiles parked on the west side of Third Street? A. North of –

[16] Q. Yes, north of Sheridan Street. A. I couldn't say for sure.

Q. Is there a stop sign controlling that intersection? A. Yes, there is.

THE COURT: That is very indefinite. There are four corners on which you could have a stop sign.

BY MR. BOYNTON:

Q. Could you tell the Court and jury where that stop sign is located? A. It's located on Sheridan Street just west of Third Street, the south side of the street.

Q. That stop sign faces west on Sheridan Street? A. Faces east – faces east, yes.

THE COURT: Which corner –

THE WITNESS: That is, coming east.

THE COURT: On which corner of the intersection is the stop sign?

THE WITNESS: It's right where the street would be on there.

THE COURT: Is it on the southeast or southwest corner?

THE WITNESS: Southwest.

Q. Were you aware when you were driving down Sheridan [17] Street that there was a stop sign at that intersection? A. Yes, sir, I was.

Q. What are the rules and regulations that you, as a driver of an emergency vehicle in the District of Columbia, operate under, regarding a fire engine approaching a stop sign when it is responding to a call? A. We are not required to stop. We are supposed to use due caution in going through, which I was doing.

Q. Would you describe to the Court and jury what due caution you are referring to? A. Well, braking and –

MR. QUINN: Your Honor, if I may object. I think he is usurping – I object to this question on his interpreting what due caution means.

THE COURT: Objection overruled. The jury will have to decide what due caution is, but the witness may state what steps he took in the interest of due caution. That is in effect what he is doing.

BY MR. BOYNTON:

Q. You may answer, Mr. Walsh. A. I was braking and

using all possible caution I could because I know that is a dangerous intersection. I slowed down considerably.

[18] MR. BOYNTON: I have no further questions at this time, Your Honor.

THE COURT: Any cross-examination?

CROSS-EXAMINATION

BY MR. QUINN:

Q. Mr. Walsh, when you were proceeding on Sheridan Street do you recall where you were on Sheridan Street when you first made this observation to your left to check traffic on Third Street? A. Well, you check it all the way down, say from Fourth all the way down the hill, because you know you can't check it until you get close to the intersection.

Q. Mr. Walsh – A. Back of the building line.

Q. What's that, sir? A. Back of the building line, where the buildings is, a good ways back, you start looking one way or the other.

Q. When you refer to the building line to what are you referring? A. Well, the buildings on the southwest corner that come very close out to the corner there, to the curbing.

Q. Mr. Walsh, the buildings are located in this area here, are they not? [19] A. That is right.

Q. Would you indicate that when you were at the beginning of these buildings is when you first made your observation to the left? A. I'd say yes, approximately 100 feet.

Q. Approximately 100 feet? A. That is about it.

Q. Sir, you referred to, I believe, forsythia bushes on Third Street, did you not? A. I said forsythia. I don't know whether they are, but the looked like forsythia.

Q. And they would be located in this area here? A. All along Third Street.

Q. They would be located, I believe you said, all along here? A. Yes, sir.

Q. Sir, this is a playground, is it not? A. I think so, yes, sir.

Q. And there is a school located up here? A. That is right.

Q. The intersection before Third Street is Fourth Street? A. On the south. Fourth Street don't go through, it [20] ends at Sheridan Street going north.

Q. And is there a traffic control signal on Fourth Street? A. No, sir.

Q. There is not? A. No, sir. There is one at Fifth Street but not at Fourth.

MR. QUINN: If I may, with the Court's permission, just indicate that Fourth Street would be up here.

THE WITNESS: Yes, sir.

BY MR. QUINN:

Q. Fourth Street is at this area here. What is at the corner of Fourth and Sheridan Street? A. I don't understand.

Q. Sir, isn't there a school located on Fourth and Sheridan also? A. On the south side also.

Q. There is a school in this area here? A. On the west side of Fourth Street.

THE COURT: There is a school on Third Street, is there not? I thought you testified there was a school on Third Street, is there not?

THE WITNESS: No; there is a school at Fifth Street, [21] it runs to Fourth Street, from Fourth to Fifth. The other school runs from Fourth to Fifth on the south side.

BY MR. QUINN:

Q. For purposes of clarification, there are two schools? A. Two schools.

Q. Back up in this area here? A. That is right.

Q. There is a large playground here? A. Yes.

Q. And there is a school in this area right here? A. That is right.

Q. And is there a school in this area here? A. That would be west.

THE COURT: Mr. Quinn, may I remind you that for you to point and say "in here" doesn't mean anything. Anyone who would ever read the transcript wouldn't know what the reference was.

MR. QUINN: My reference is, actually, Your Honor, to –

THE COURT: I don't care, I am just trying to make the suggestion to you. What were you referring to?

MR. QUINN: To the south side of Fourth Street.

Q. Isn't there a school at the south side of Fourth [22] Street, sir? A. There is a school on the south side of Sheridan that runs from Fourth to Fifth, but there is none – well, it does side on Fourth Street, on the west side, but not on the east side.

Q. You indicated that you were approximately 100 feet from the intersection of Third and Sheridan Street when you first observed to your left? A. That is right.

Q. And at that time you didn't see any vehicles, is that correct? A. No.

Q. Sir, when you looked to your left from 100 feet from the intersection over onto Third Street what could you see? A. You could see houses above the trees but you can't see anything on the street.

Q. You, in effect, when you made that observation from say, approximately 100 feet, you could see the bushes but you couldn't see cars on Third Street? A. That is right. There was none coming, I will say that. I couldn't see any coming. I don't know whether you would be able to see them or not.

Q. You don't know whether you are able to see them? [23] A. That is right, whether you would be able to.

Q. When you were 100 feet from the intersection and made your observation to the left did you also make an observation to the right? A. Yes, sir.

Q. Sir, wouldn't it be a fact that when you looked to your right you wouldn't be able to see any traffic on Third Street because of the buildings to your right? A. Well, you keep your eye to the right or left all the way. You have to keep your eye both ways. You wouldn't just keep it to –

Q. Could you tell me your speed when you made this observation from approximately 100 feet away from the intersection of Third and Sheridan Street? A. I'd say I was doing about 25 miles an hour.

Q. Could you have been doing 30 miles an hour? A. I could have, but I think it was more like 25 because it's downgrade and I was braking. It's a downgrade hill there.

Q. Where does the hill start that you referred to? A. It starts about Fourth Street, if I remember.

Q. And that of course is the intersection before Third Street? [24] A. That is right.

Q. How would you characterize this hill that you referred to?

THE COURT: What do you mean by characterize?

BY MR. QUINN:

Q. Is it a steep grade? A. I –

THE COURT: Ask a more definite question, if I may suggest to you.

Q. Would you characterize – A. I wouldn't characterize it as a steep grade.

THE COURT: Don't ask him to characterize it; just ask a definite question.

Q. I will ask you if you could describe the grade for us of the hill from Fourth Street as you proceed towards Third Street, the grade of Sheridan Street? A. No, I couldn't, not in degrees or anything, but it is a downgrade.

Q. Does that grade continue to Third Street? A. It continues to within about, I'd say 50 feet and then it levels off.

Q. When did you first start braking as you were proceeding on Sheridan Street between Fourth and Third Street? [25] A. I'd say at the top of the hill.

Q. And you were going – A. That is, at Fourth Street.

Q. You were going approximately 25 miles an hour when you made this observation? A. Yes, sir.

Q. 100 feet from Sheridan. Did you continue at 25 miles an hour? A. No, I gradually slowed down coming to the intersection.

Q. What speed did you slow down to? A. Between 15 and 20 miles an hour.

Q. Where were you when you slowed to 15 to 20 miles an hour? A. Just back of the intersection. I'd say where that "n" on "Sheridan" would be; about 50 feet or so.

Q. You were in this area here? A. Maybe a little closer; about there.

Q. When you slowed to 15 to 20? A. That is right.

Q. And did you continue proceeding at 15 to 20 miles an hour. A. Yes, sir.

[26] Q. And where was your vehicle when you first saw the Hoover car? A. I'd say it was at the building line of the buildings on Third Street, the south side, southwest corner there, which would be back of the sidewalk.

Q. You say the building line of this building on the southwest corner of Sheridan? A. Yes, sir.

Q. And that is your approximate position when you first noted the Hoover vehicle? A. That is right.

Q. Where was the Hoover vehicle at that time, sir? A. I'd say it was to my left about 25 or 30 feet, coming straight.

Q. About 25 or 30 feet from you? A. That is right.

Q. Is that when you then applied your brakes? A. That is right. I tried to cut to the right.

Q. Do you recall the impact at all between your vehicle and the Hoover vehicle? A. Vaguely. I remember it happening, but I was knocked temporarily unconscious, momemtarily.

Q. Do you recall which part of your vehicle struck [27] the Hoover vehicle? A. The left front fender and wheel.

Q. Left front fender and wheel of the fire engine struck what part of the Hoover vehicle? A. I never saw the vehicle after that. It was towards the front or the middle, but it wasn't on the rear. It was towards –

THE COURT: You say left front?

THE WITNESS: Left front fender and wheel of mine. It was towards the front or center; I don't know just which. I never saw it afterwards because I was taken to the hospital.

MR. QUINN: I would request this be marked as Defendant's No. 1 for identification.

(Photograph marked Defendant's Exhibit No. 1 for identification.)

BY MR. QUINN:

Q. I will show you what has been marked Defendant's No. 1 for identification and ask you if you can identify that? A. You mean the intersection?

Q. Yes, sir.

THE COURT: Can't that be stipulated? Show it to counsel.

MR. QUINN: I have shown it to counsel.

[28] THE COURT: Will that be stipulated?

MR. BOYNTON: Yes, Your Honor.

THE COURT: Very well.

THE WITNESS: Yes, sir, that is the intersection of Third and Sheridan.

THE COURT: You may offer it in evidence if you wish.

MR. QUINN: I choose not to offer it at this time, Your Honor.

THE COURT: I want to say my view is defense counsel does not waive any rights by offering exhibits during the plaintiff's case. I know some lawyers have some hesitancy about it. You don't waive any rights doing that.

MR. QUINN: Thank you, Your Honor. With that assistance of the Court I will offer that at this time.

THE COURT: My view of that rule is that it was changed by the Federal Rules of Civil Procedure which became effective in 1938.

(Defendant's Exhibit No. 1 for identification was received in evidence.)

THE COURT: Does this represent Sheridan Street or Third Street?

MR. QUINN: That represents the intersection of –

[29] THE COURT: I understand, but the street on the photograph that faces the person looking at the photograph.

MR. QUINN: That is Third Street, Your Honor, and coming in from the right here is Sheridan Street showing the building.

THE COURT: Is this looking south or north?

MR. QUINN: That is Third Street looking south.

THE COURT: In other words, this photograph is a photograph of Third Street looking south and its intersection with Sheridan Street, is that correct?

MR. QUINN: That is correct, yes, Your Honor.

THE COURT: You may pass this to the jury if you wish. Hand it to Juror No. 7 and she will pass it along.

(The exhibit was handed to the jury.)

MR. BOYNTON: Your Honor, I would like to note that that picture has a date on it. I think it ought to be brought to the jury's attention that this was not taken on the day or near the day of the accident.

THE COURT: I presume that is understood. This only shows the intersection, it doesn't show the accident.

MR. BOYNTON: That is correct, Your Honor.

THE COURT: I don't suppose the intersection changed very much.

[30] MR. BOYNTON: No.

THE COURT: You may proceed.

MR. QUINN: Your Honor, I would like to have this photograph marked as Defendant's 2 for identification.

(Photograph marked Defendant's Exhibit No. 2 for identification.)

THE COURT: Are you going to offer it in evidence?

MR. QUINN: Yes, I am.

THE COURT: Suppose you show it to Mr. Boynton. Were these photographs marked at pretrial?

MR. QUINN: No, Your Honor, they were not.

THE COURT: They should have been.

MR. QUINN: Yes, Your Honor.

THE COURT: I think all those things should be done at pretrial. It saves a lot of time at the trial. That is one of the main purposes of pretrial.

MR. QUINN: Your Honor, I would offer this picture into evidence.

THE COURT: What is it?

MR. QUINN: This is a further picture of the intersection of Third and Sheridan Street. Actually, I believe that picture would be on Third Street looking north, showing the –

[31] THE COURT: In other words, this shows Third Street at its intersection with Sheridan Street.

MR. QUINN: Yes, Your Honor.

THE COURT: Third Street looking north.

(Defendant's Exhibit No. 2 for identification was received in evidence.)

THE COURT: You may pass it to the jury if you wish.

(The exhibit was handed to the jury.)

BY MR. QUINN:

Q. As you proceeded in or near the intersection of Third and Sheridan Street did you see any school children in the area? A. Only at Fifth Street. There was a school crossing guard there and there were children there. That is the only ones I saw.

Q. That would be at Fifth Street? A. Fifth Street.

Q. But you did not see any school children in the area of Third and Sheridan Street? A. No.

Q. And you didn't see any crossing guard? A. No.

[32] Q. After going through the intersection of Third and Sheridan Street where did you intend to go, what route, which one of those streets did you intend to take? A. Straight through, east on Sheridan Street to Blair Road.

Q. You were not going to turn onto North Dakota? A. No, straight through.

MR. QUINN: That is all I have, Your Honor.

THE COURT: Any redirect examination?

MR. BOYNTON: No, Your Honor. May the witness be excused?

THE COURT: The witness may be excused.

MR. BOYNTON: If Officer Wiseman is here I will take him. If not, Mr. Stratford.

MR. QUINN: Before Mr. Walsh is excused I would like to ask him one more question, if I may.

THE COURT: Yes. Ask Mr. Walsh to return.

BY MR. QUINN:

Q. Mr. Walsh, did you have a conversation or discuss this accident with a police officer after it had occurred? A. He questioned me at the hospital, but that is all.

Q. Was that Officer Wiseman? A. I think it was, yes.

[33] MR. QUINN: Thank you. That is all I have, Your Honor.

THE COURT: The witness may be excused. Let the witness sit down in the courtroom a moment. I want counsel to come to the bench.

(At the Bench:)

THE COURT: Is it your intention to elicit any statements made by Mr. Walsh to Officer Wiseman?

MR. QUINN: Yes, it is, sir.

THE COURT: You haven't laid a foundation for it. I thought I owed it to you to warn you.

Any witness who is going to be impeached by alleged contradictory statements made by the witness must first be confronted with the statement. It is not enough to say did so and so question you.

MR. QUINN: Your Honor, with the Court's permission I will confront him with what I believe he told the officer.

THE COURT: You may do so. You may recall him for that purpose. Otherwise, I will exclude any question to the officer as to what Walsh said.

MR. QUINN: Your Honor, may I just have one moment? I want to check something in the transcript I have.

THE COURT: Surely.

[34] MR. QUINN: I believe I do want to recall him, but I would like to check this one thing in the transcript.

THE COURT: Surely.

(In Open Court:)

THE COURT: I am going to ask Mr. Walsh to remain for a few minutes.

(Pause.)

MR. QUINN: Your Honor, I would ask that he be recalled.

THE COURT: What you mean is that you want to reopen your cross-examination?

MR. QUINN: Yes, I do. I would like to reopen my cross-examination with reference to the point I referred to at the bench.

THE COURT: Very well. Mr. Walsh, will you resume the stand.

BY MR. QUINN:

Q. Mr. Walsh, with reference to your conversation with Officer Wiseman at the hospital, do you recall whether Officer

Wiseman asked you how fast you were going as you proceeded on Sheridan Street towards the intersection? A. I recall him asking me that, yes, sir.

Q. Isn't it a fact that you told him you were going –

[35] THE COURT: Have you got a deposition in writing there? Is it the witness' deposition?

MR. QUINN: No, it isn't the witness' deposition.

THE COURT: Very well, you may proceed with your question.

BY MR. QUINN:

Q. Mr. Walsh, isn't it a fact that you told Officer Wiseman that you were going 25 to 30 miles an hour as you proceeded on Sheridan Street towards the intersection of Third Street – of Sheridan Street? A. Yes, but at the time I had just gotten off of the hospital table. I had been on there about an hour. I told the nurse that I was dizzy and not feeling too good. As I went outside the door the police was right there questioning me and I was a little confused at the time. When I got myself together I told him it was 15 to 20. But I was confused at the time because I was dizzy. I told the nurse that I was dizzy when I got off the table and I was confused at the time.

THE COURT: Were you on the oprating table when you were questioned, is that it?

THE WITNESS: No; as I came off the operating – the table, I was dizzy.

Q. Sir, didn't you indicate that the officer questioned [36] you after you came out of the operating room? A. That is right.

Q. Where did this discussion take place with the officer? A. Right outside of – I'd say as far from here to that board outside of the room. I don't think you call it the operating; the emergency room.

Q. You told the officer then that you were going 25 to 30 miles an hour? A. I think that is what I told him, but I was confused at the time.

THE COURT: Did you change your answer afterwards?

THE WITNESS: Yes, sir.

THE COURT: Just what did you say then?

THE WITNESS: I asked him to change it to 15 or 20 because when I got my senses together – I was confused because, as I say, I was dizzy and a little nauseated, like, and I went right outside the door and the police were questioning me.

BY MR. QUINN:

Q. Sir, may I ask you where you were when you asked the officer to change it to 15 to 20 miles an hour? A. Still in the hospital.

Q. And what was his response to that? A. He said okay. That is all he did, as far as I know.

[37] MR. QUINN: Your Honor, before I proceed I would like to approach the bench for one point of order.

THE COURT: Yes, you may do so.

(At the Bench:)

MR. QUINN: Your Honor, this is a transcript of the Coroner's inquest. If I utilize this I just wanted the Court's suggestion, do you want me to refer to it? But I don't want to create anything unfavorable by the use of this.

THE COURT: Is this testimony of the witness?

MR. QUINN: It's the whole transcript of –

THE COURT: But is it your desire to confront the witness with statements that he made? Did he testify at the inquest?

MR. QUINN: Yes, he did.

THE COURT: You have a right to say: Did you at a hearing held on such and such a date say so and so, if you don't want to identify the occasion.

MR. BOYNTON: Your Honor, there was no right of cross-examination at that hearing by this party.

THE COURT: I know, but that doesn't affect the right of counsel to confront the witness with his statement. You can examine him on redirect. Yes, you may proceed in that way.

MR. QUINN: Thank you.

[38] (In Open Court:)

BY MR. QUINN:

Q. Mr. Walsh, at the hearing of this matter that took place on November 26, 1963, do you recall that hearing, sir? A. The Coroner's inquest?

Q. Yes, sir. You were present then, of course? A. Yes.

Q. Do you recall hearing Officer Wiseman's testimony at that hearing? A. I recall it but I don't know whether I could –

THE COURT: No, you may confront the witness with his own statement but not with some other person's statement.

MR. QUINN: Your Honor, in view of his –

THE COURT: You may not confront him with what some other witness said. You may confront him with anything that he said.

MR. QUINN: Yes, Your Honor.

Q. With reference to this hearing that took place the question was asked you –

THE COURT: No, you may not make any statement. You may ask him was the following question asked you and did you give the following answer.

Q. Was the following question asked you – following [39] questions, I will read two of them, and did you give the following answers:

> "Now what was your speed as you went into the intersection? Now was that your speed as you went into the intersection?"

I will strike that question and start further up. Was the question asked you:

> "What was your speed as you approached the intersection of Third and Sheridan Street?
>
> "Answer: I would say it was between 15 and 20 miles an hour.
>
> "Question: What was your speed as you went into the intersection?
>
> "Answer: As I approached it?
>
> "Question: As you were coming down Sheridan what was your speed?
>
> "Answer: I would say 30."

Did you give those responses to the questions that were asked you at the Coroner's inquest that I have just read, sir? A. I think so, yes.

Q. Sir, in the conversation that you had with Officer Wiseman at the hospital did Officer Wiseman also ask you how [40] fast you were going when the accident itself took place? A. I don't recall him asking me. I say I was confused at the time, but I don't recall him asking.

Q. You don't recall telling him that you were going 25 miles an hour –

MR. BOYNTON: Your Honor –

THE COURT: No, no, you have no right to say that. You might ask him did you tell him, because you are trying to make statements of fact and testify yourself, Mr. Quinn. That is very objectionable.

BY MR. QUINN:

Q. Did you tell him – A. I don't recall telling him that.

Q. You don't recall telling him – my question, if I can finish it was, did you tell him that you were going 25 miles an hour when the accident happened? A. I don't recall it.

Q. You don't have a specific recollection of it? A. No.

THE COURT: Just a moment. He has answered your question. He doesn't recall saying any such thing.

THE WITNESS: I say I was confused at the time, I was dizzy and I told the nurse that I was. But I don't recall that.

[41] MR. QUINN: I have no further questions at this time.

THE COURT: Do you have any redirect examination?

MR. BOYNTON: Your Honor, I would like to approach the bench, if we may.

THE COURT: Very well.

(At the Bench:)

MR. BOYNTON: Your Honor, I think it is highly prejudicial that this Coroner's point was brought into testimony, that it exists, and I believe that I have a right to ask him whether or not there were any charges placed against him as a result of this Coroner's inquest, and in the alternative if the Court denies that, I would move for a mistrial.

if the Court denies that, I would move for a mistrial.

THE COURT: I am not going to grant a mistrial. I don't know what you mean by in the alternative. You ask one thing at a time, Mr. Boynton. You don't make applications to the Court in the alternative and ask the Court to choose.

MR. BOYNTON: Your Honor, I would move that I be permitted to question this witness as to the outcome of this Coroner's inquest.

MR. QUINN: I object to that.

THE COURT: Objection sustained.

MR. BOYNTON: I would move for a mistrial.

THE COURT: On what ground?

[42] MR. BOYNTON: That it is prejudicial that the jury has been informed there has been a Coroner's inquest.

THE COURT: Why, there must be a Coroner's inquest. It is a matter of common knowledge that when a person is killed in an accident there will be a Coroner's inquest.

MR. BOYNTON: But they are not informed as to what the outcome of that inquest was.

THE COURT: I don't think that is the jury's concern. Motion denied. Don't make ill-founded motions for a mistrial, Mr. Boynton. That is not good. A motion for a mistrial must be made only on something very serious. Not only isn't there anything sufficiently serious to justify a mistrial, but the question itself was not objectionable. Mr. Quinn would have had a right to put the question bluntly, Did you testify at the Coroner's inquest on such and such a date? Yes. And did you say so and so? That is a permissible question.

Now let's move along, gent'emen, without wasting time coming to the bench.

(In Open Court:)

MR. BOYNTON: I have no further questions.

THE COURT: Mr. Walsh may be excused.

MR. QUINN: Your Honor, may I request that this [43] witness be held available?

THE COURT: No: I think the witness has rights too.

MR. QUINN: I agree that he does, Your Honor, but in view of the possibilities that might arise –

THE COURT: You may re-subpoena him. I am not going to keep any witness in the courthouse on a chance. We sometimes don't consider the fact that witnesses have no interest in the litigation. I don't think they should be kept sitting around the courthouse unnecessarily.

MR. QUINN: Your Honor, I don't want him to stay around the courthouse. I just want, in the event I needed him, to be available. I would certainly call him or make contact with him. That is all that I ask.

THE COURT: I am not going to ask him to stay home and wait for a telephone call either. I am excusing the witness. You may re-subpoena him if you need him or you may take a chance on telephoning him, but I am not going to instruct him to be in a position at all times where he can get a telephone call.

I want to say another thing to both of you gentlemen. I try to reduce bench conferences to a minimum. Don't ask an opportunity to come to the bench unless there is something really important, because all these little things just [44] prolong trials unnecessarily. Let's move along. You may be excused, Mr. Walsh.

WALTER R. WISEMAN

called as a witness by Plaintiff, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BOYNTON:

Q. Would you please state your full name? A. Officer Walter R. Wiseman.

Q. Are you attached to the Metropolitan Police Force? A. Yes, sir.

Q. What unit are you attached to? A. The Accident Investigation Unit.

Q. Directing your attention to Tuesday, November 19, 1963, were you called upon to investigate an accident? A. Yes, sir.

Q. Where was that accident? A. Third and Sheridan Street.

Q. What time did you arrive at the scene? A. I don't know, sir. I failed to write that information down.

Q. Could you tell us what you observed when you did arrive at the scene? [45] A. I arrived at Third and Sheridan. In the middle of the intersection there was a fire apparatus sitting diagonally, and on South Dakota Avenue there was a wrecked Plymouth sitting diagonally at the curb.

Q. Did you make any measurements or any technical observations involving this accident? A. Yes, sir.

Q. Could you tell the Court and jury what measurements and what your findings were in relation, first of all, to the fire truck? A. Well, in relation to the fire apparatus, I positioned – and when I refer to positioning a vehicle you take three measurements. The first measurement was taken – may I approach the blackboard?

THE COURT: Yes, you may.

(The witness approached the blackboard.)

THE WITNESS: The first measurement was taken from the fire apparatus, which was resting in somewhat this position, diagonally in the intersection. The left front of the apparatus was 13 feet from this imaginery curb line extending straight down. The rear of it, the left rear of it was 15 feet west of the east curb line. The same left rear corner was measured and it was 23 feet 6 inches south of the north [46] curb line of Sheridan Street.

Q. Would you please now relate what measurements you took of the automobile? A. The automobile was resting on the south curb of North Dakota, almost at a 45 degree angle. The right rear of the vehicle was 17½ feet east of the east curb of Third Street. The rear of it was resting on the same latitude as the point of the island of Third and North Dakota. The right front was at the curb line of North Dakota, the south curb line of North Dakota.

Q. Were there any skid marks that were observable? A. There were some skid marks prior to what we determined was the point of contact –

THE COURT: What was your answer about the skid marks?

THE WITNESS: Yes, sir, there were.

BY MR. BOYNTON:

Q. Could you tell me where those were? A. The first skid marks started 11 feet south of the north curb and 9 feet east of the west curb from where approximately the fire apparatus and the vehicle came in contact. From this point on they weren't skid marks, they were brush marks from the vehicles pivoting out of their path. There [47] was 8 feet of skid mark from the fire apparatus proceeding to this point of contact; from there on there was 28 feet of brush marks, the fire apparatus back end swinging and front end pivoting around.

Vehicle No. 2, with reference to the car, had 48 feet of brush mark. After it was struck it also pivoted from point of contact.

Q. Were you able to observe any skid marks as to the automobile? A. There were no visible skid marks.

THE COURT: The automobile made no skid marks?

THE WITNESS: No, Your Honor.

THE COURT: And the fire apparatus did?

THE WITNESS: 9 feet prior to contact.

BY MR. BOYNTON:

Q. Did you take measurements of the streets, the widths? A. Yes, sir.

THE COURT: Suppose the officer resumes the witness stand.

MR. BOYNTON: I would like him to write the measurement figures of the streets on the board, if he could, Your Honor.

Q. Would you put down the width of Sheridan Street, [48] please, on the west side?

THE COURT: No; will you tell us what the width was. I think it should be in the record. The diagram will be erased after the trial. Suppose we have the witness resume the witness stand.

(The witness resumed the stand.)

BY MR. BOYNTON:

Q. Did you take a measurement of the width of Third Street? A. Third Street, yes, sir. Third Street is 57 feet.

Q. How many lanes is Third Street? A. I believe it is 6. I am not sure. 57 feet would be approximately 6 lanes, 2 parked and 2 moving in each direction.

Q. How many lanes would Sheridan Street be? A. Sheridan would have 4 lanes, 2 parked and 2 moving.

THE COURT: And Third Street has 3 lanes in each direction?

THE WITNESS: Yes, sir.

Q. Were any photographs taken at the scene? A. Yes, sir.

Q. Who were those photographs taken by? [49] A. They were taken by my partner, Officer Thomas.

Q. Of the Accident Investigation Unit? A. Yes, sir.

Q. May I see those photographs, please?

(The witness complied.)

THE COURT: We will take our usual mid-morning recess while you gentlemen examine the photographs.

(Recess.)

(The following proceedings were had out of the presence of the jury:)

THE COURT: Before the jury is brought in I would like to have counsel come to the bench.

(At the Bench:)

THE COURT: Mr. Quinn, it is difficult for me to understand your strategy in this case. You have a pretty good case on the issue of the measure of damages. I think you have. I think it would be pretty difficult to recover real substantial damages here. But I think you are making your case much worse, much more difficult, yourself, by contesting liability and asking all these questions of the Fire Department driver. I am going to instruct the jury that a fire apparatus has the right of way, that they are not bound by speed limits, they are not bound to even consider a stop sign or a red light, [50] that it is the duty of all moving traffic to stop, the driver of a fire apparatus has a right to assume that moving traffic will

stop. Of course the driver of a fire engine cannot drive recklessly and go down racing like a mad man. For example, if they hit a parked car, that is different; but when they hit a moving car that didn't stop, your position is very weak indeed because they had a right to assume that the moving traffic stopped.

You are likely to get a much bigger verdict against you if you keep on contesting liability than if you either formally admit liability or don't at least aggressively contest it.

I personally think, too, that it is a waste of the Court's time and the time of other litigants who are waiting to get their cases tried.

On the other hand, Mr. Boynton, I don't see how you can expect a big award here. To be sure, the children here got occasional gifts and that is a peg for you to hang a claim on, but that is about all it amounts to because I shall have to instruct the jury, and I shall, that they cannot consider sentimental loss, mental anguish, as you know, merely financial loss.

You better talk to your seniors during the noon [51] recess, Mr. Quinn. I think this case ought to be settled, but certainly if you can't compromise the amount of damages you ought to concentrate on the issue of damages. There you have something worth contesting.

(In Open Court:)

THE COURT: You may bring in the jury.

(The jury resumed the jury box.)

THE COURT: You may proceed.

MR. BOYNTON: At this time I would like to have these photographs marked for identification and introduced into evidence as Plaintiff's Nos. 1 letters A through J. While those are being marked, Your Honor, may I proceed?

THE COURT: Wait until the exhibits are marked. Let them be admitted.

(Photographs marked Plaintiff's Exhibits Nos. 1-A through 1-J and received in evidence.)

THE COURT: You may pass them to the jury if you wish.

(The exhibits were handed to the jury.)

BY MR. BOYNTON:

Q. Officer, did your investigation show what the posted speed limit was on Third Street?

[52] THE COURT: That is a matter of regulation, isn't it?

MR. BOYNTON: Yes, Your Honor.

THE COURT: I think you gentlemen can stipulate what it was.

MR. BOYNTON: I believe it was different for the two streets and that is what I am trying to determine.

THE COURT: I understand. Can't you stipulate on that? That is a matter of record.

MR. BOYNTON: I was in error, Your Honor; it is the same for both. It is 25 miles per hour.

THE COURT: Very well. That is stipulated, I take it. I think the speed is 25 miles an hour except on those streets that are otherwise enumerated in the traffic regulations.

MR. BOYNTON: I believe that is correct, Your Honor. I have no further questions at this time.

THE COURT: Very well. I want to say this: Of course speed limits are not binding on fire apparatus when they are responding to a fire.

CROSS-EXAMINATION

BY MR. QUINN:

Q. Officer Wiseman, with reference to your measurements at the scene of the accident, could you tell us or did you make [53] a measurement as to how far the fire apparatus traveled after its collision with the vehicle? A. Yes, sir, I did.

Q. How far did it travel? A. The vehicle traveled 49 feet.

Q. Did you make the same measurement –

THE COURT: When you say the vehicle do you mean the fire apparatus?

THE WITNESS: Yes, sir, fire apparatus.

BY MR. QUINN:

Q. With reference to the passenger vehicle did you make the same measurement with reference to that? A. Yes, sir, I did.

Q. How far did that vehicle travel after impact? A. Passenger car traveled 95 feet after impact.

Q. From your investigation at the scene of the accident were you able to determine which vehicle was the striking vehicle? A. Vehicle No. 1 we indicate as the striking vehicle.

THE COURT: Which is No. 1?

THE WITNESS: Vehicle No. 1 is referred to as the fire apparatus.

Q. With reference to this measurement which you made [54] and indicated on the board, I believe 11 feet, which I believe is from the north curb line of Third Street? A. Yes.

Q. Out into – is that 11 feet south into the intersection? A. Yes, sir.

Q. Is that the approximate point of impact? A. No, sir, that was the beginning of the skid mark.

Q. Were you able to ascertain from your investigation at the scene where the point of impact was? A. Yes, sir.

Q. Could you give us that measurement, please? A. The approximate point of impact was 12 feet 9 inches south of the north curb line of Sheridan Street and 17 feet east of the west curb of Third Street.

THE COURT: May I have those figures again, please?

THE WITNESS: 12 feet 9 inches south of the north curb of Sheridan, 17 feet east of the west curb of Third Street.

THE COURT: It was right in the intersection?

THE WITNESS: Yes, sir.

BY MR. QUINN:

Q. When you conducted your investigation did you observe any parked cars on the west side of Third Street north [55] of the intersection? A. Yes, sir, when I arrived at the scene there was a car parked, several of them.

Q. How close was that – what was the distance from the, I believe the northwest corner to this parked car that would be located on the west side, the first parked car located on the west side of Third Street?

MR. BOYNTON: Your Honor, I object to this line of testimony.

THE COURT: You can't object to a line, you can object to a question. Do you object to this question?

MR. BOYNTON: Yes, Your Honor.

THE COURT: On what ground?

MR. BOYNTON: It has not been established those parked cars were there at the time of the accident.

THE COURT: Will you read the question?

(The Reporter read the last question.)

THE COURT: There is no evidence there was any private car, is there?

MR. QUINN: Yes, I believe there is, Your Honor. I believe Mr. Walsh indicated there were cars parked there.

THE COURT: Yes, but you are referring to some particular private car. I think you better reframe your [56] question. I will sustain the objection to the question in its present form.

BY MR. QUINN:

Q. When you arrived at the scene of the accident did you observe any parked vehicles? A. Yes, sir.

Q. Where were these parked vehicles located when you arrived at the scene of the accident? A. Well, there were cars parked on both sides, north and south sides of Third Street, radiating from each direction of Sheridan, also on Sheridan in both directions.

THE COURT: Both sides of Sheridan?

THE WITNESS: Yes, sir.

MR. QUINN: I wonder if we can have the officer indicate on the board where he found these parked cars.

THE COURT: Yes, you have a right to ask him that.

Q. Would you put these on the board, please?

(The witness approached the blackboard.)

THE WITNESS: The only parked car that I positioned at the time of the accident was one located on Third Street north of the accident, scene of the accident. There were parked cars on Sheridan, east from the accident, also on Sheridan on the south side of Sheridan west of the accident, and on Third [57] Street south of the accident. I did not get the location of those vehicles.

(The witness resumed the stand.)

Q. With reference to that parked car that you have drawn in, did you measure the distance from the north curb line of Third Street back to this parked car? A. Yes, sir, I did.

Q. What is that distance? A. 85 feet north of the north curb line.

Q. I show you what has been introduced into evidence as Plaintiff's Exhibit No. 1 and I will ask you if the parked car that is located on the lefthand corner of that picture, which would be the west side of Third Street north of the intersection, would that be the car that you made the measurement to? A. I don't know.

Q. Would that depict the approximate location of that car? A. Yes, sir.

Q. I show you what has been admitted into evidence as Defendant's Exhibit No. 2 and again refer to the west side of Third Street north of the intersection and will ask you if that first car, parked car that is located there, would be the [58] approximate location of the car that you measured to on the day of the accident? A. Yes, sir, it looks very similar to the area.

MR. QUINN: I wonder if we might have the officer circle that car on the picture.

THE COURT: Surely – just a moment. This is the plaintiff's exhibit and it may be that the plaintiff prefers not to have his exhibits marked.

MR. BOYNTON: This is a defendant's exhibit, Your Honor.

THE COURT: Very well, you may have it marked.

(Pause.)

MR. QUINN: It won't mark with this pencil, Your Honor. I think counsel and I can stipulate the car referred to is the first one here. The mark won't take.

BY MR. QUINN:

Q. Officer, did you have any conversation with the driver of the fire apparatus? A. Yes, sir, I did.

Q. Where did this conversation take place? A. At the scene of the accident.

Q. Did you ask the operator, Mr. Walsh, certain questions at the scene of the accident? [59] A. I believe I did, yes.

Q. Did you ask him what his speed was as he approached the scene of the accident? A. Yes, sir.

Q. What was his reply to that? A. 25 to 30.

Q. Did you ask the officer how fast he was going when the accident took place? A. Yes, sir.

Q. What was his response to that? A. The same speed.

Q. With reference to the automobile, Mrs. Hoover's car, did you have occasion to observe that car at the scene of the accident? A. Yes, sir.

Q. Did you check it with reference to the windows in that car? A. Yes, sir.

Q. Could you tell us whether these windows were open or closed when you observed it? A. All windows were up in the vehicle. They were broken out but they indicated they were up at the time of the accident.

[60] THE COURT: You mean they had been closed?

THE WITNESS: Yes.

BY MR. QUINN:

Q. Did Mr. Walsh indicate to you in the conversation that you had with him his location when he first noticed the Hoover vehicle? A. Yes, sir.

Q. What was that distance? A. He stated about 10 feet.

MR. QUINN: I have nothing further, Your Honor.

THE COURT: Any redirect examination?

MR. BOYNTON: Just one question, Your Honor.

REDIRECT EXAMINATION

BY MR. BOYNTON:

Q. Officer, do you recall giving testimony concerning this accident at a hearing? A. At the inquest. I don't recall the exact testimony.

Q. Do you recall being asked –

THE COURT: Just a moment. Are you trying to cross-examine the officer?

MR. BOYNTON: I am trying to refresh his recollection, Your Honor, on a point. He testified that he spoke –

THE COURT: This time you better come to the bench.

[61] (At the Bench:)

THE COURT: You are not seeking to impeach your own witness, are you?

MR. BOYNTON: No, Your Honor.

THE COURT: What are you trying to do?

MR. BOYNTON: Refresh his recollection. He testified that he spoke to the driver at the scene. At the inquest he testified the first time he spoke to him was at the hospital.

THE COURT: Very well, you may ask him that. I don't think it makes too much difference.

MR. BOYNTON: In that the driver testified that he was in a dazed condition the first time he spoke to him.

THE COURT: Well, he must have been more dazed at the scene of the accident, Mr. Boynton, so I don't see why you want to follow that up. You have a right to do it if you wish.

MR. BOYNTON: I will withdraw it, Your Honor.

(In Open Court:)

MR. BOYNTON: I have no further questions, Your Honor.

THE COURT: The officer may be excused.

MR. BOYNTON: Mr. Stratford.

[62] JOHN E. STRATFORD

called as a witness by Plaintiff, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BOYNTON:

Q. Would you please state your full name and address? A. John E. Stratford. 11106 Bucknell Drive, Wheaton, Maryland.

Q. Mr. Stratford, directing your attention to Tuesday, November 19, 1963, did you have an occasion to be in the area of Third and Sheridan Streets, Northwest, here in the District of Columbia? A. Yes, I did.

Q. Were you a pedestrian or driving your automobile at that time? A. I was driving an automobile.

Q. In what direction were you driving? And if you would please refer to this drawing, it may help orient you. A. I was on Third Street proceeding north.

Q. Did you observe any fire apparatus in that area? A. When I crossed over Rittenhouse Street I heard the siren, pulled over to the right and slowed the speed of the car and I witnessed a fire truck cross the intersection of [63] Sheridan, yes, sir.

Q. Where were you in relation to the length of that block when you pulled over? A. Approximately middle ways.

THE COURT: How far?

THE WITNESS: Approximately middle ways on the right side.

BY MR. BOYNTON:

Q. The fire engine that you referred to, did you see any lights on that fire engine? A. The first one or the second one?

Q. The first one that you spoke of. A. No, sir, I did not.

Q. Did there come a time when you saw a second fire engine? A. Yes, sir.

Q. Where did you first observe that? A. As it entered the intersection or crossed the building line.

Q. The building line you are speaking of is on the southwest corner of Sheridan and Third Streets? A. Yes, sir.

Q. How far back from the curb line are those buildings? [64] A. Approximately 20 or 25 feet, I would say.

Q. Did you observe any other vehicular traffic in that area at that time? A. There was a car approaching that intersection from the north.

Q. On Third Street? A. On Third Street, yes.

Q. Would you tell the Court and jury what happened then? A. Well, the car proceeded in the intersection, and of course the sirens were very loud at that time, and when the fire truck entered the intersection it collided. The siren was on and the flasher light or the blinker light was revolving.

Q. Did you observe the automobile swerve or make any effort to stop or anything of that nature? A. No, sir, I did not.

MR. QUINN: Your Honor, I am going to object to a leading question.

THE COURT: Objection overruled. I don't see how that question could be framed in any other way.

MR. BOYNTON: I have no further questions, Your Honor.

CROSS-EXAMINATION

BY MR. QUINN:

Q. Mr. Stratford, you indicated that you first pulled [65] over because of a first fire engine that was going through the intersection? A. I heard the fire engine and saw it go through, yes, sir.

Q. You saw it go through? A. Yes, sir.

Q. Then you proceeded on again, is that correct? A. No. As I crossed over the intersection of Rittenhouse I heard the siren of the first fire truck and then I proceeded to pull over and reduce speed about middle ways of the block.

Q. And then after pulling over what did you do after that? A. After that I stopped to listen for the on-coming fire truck, the other one, the second one.

Q. You saw the first fire engine cross the intersection of Sheridan and Third Street? A. Yes, sir.

Q. And then did you start up again? A. No, sir.

Q. You didn't? A. No, sir.

Q. You stayed stationary on the righthand side of the [66] street? A. On the righthand side, yes, sir.

Q. Whereabouts were you located? A. Approximately middle ways of the righthand side there.

Q. In this area here? A. Back a little farther this way, I would think. Somewhere about middle ways of the block.

Q. What would you say your distance was from the intersection when you stopped there? A. I would be afraid to say. I was approximately half-way of that block. The distance of a block I do not know.

Q. Were there any cars parked on the righthhand side, your righthand side? A. Yes, parking was allowed on that side of the street.

Q. Were there any cars parked in that area here, the righthand side of Third Street, as you were proceeding along there? A. Yes, sir.

Q. And were you able to pull over to the curb? A. No, not to the curb.

Q. So, in effect, you were sort of doubled parked, is that correct? [67] A. That is right.

Q. And it was in that position that you watched the first vehicle go by? A. That is right.

Q. And then you started up again? A. No, sir.

THE COURT: He didn't say that. He said just the opposite, Mr. Quinn.

BY MR. QUINN:

Q. You stayed stationary? A. That is right.

THE COURT: I think you ought to be very careful when you summarize a witness' answer to do it accurately, Mr. Quinn.

Q. Mr. Stratford, after watching the first vehicle go through the intersection did you then hear another siren? A. There was a continuous siren at all times.

Q. And you stayed stopped? A. Yes, sir.

Q. When you observed the fire engine you indicated that it was beyond the building line of the buildings on the southwest corner of Sheridan Street? A. Yes, sir.

[68] Q. What was the speed of the fire engine when you noticed it? A. The second fire engine or the first fire engine?

Q. What was the speed of the second fire engine? A. Well, I estimated approximately 30 or 35 miles an hour.

Q. Did you observe any change in the speed of the fire engine from the time you first saw it till the time that the collision occurred? A. Well, he tried to avoid the accident.

Q. My question to you was, did you notice any change in the speed of the fire engine? A. No, sir, not from that distance I could not.

Q. In effect was the fire engine traveling at the same speed when the accident took place as when you first saw it? A. No, I don't think that could be possible because he had applied the brakes.

Q. Did you hear any squeal of tires on the fire engine? A. No, sir, I did not.

Q. Sir, as you crossed Rittenhouse Street was your left-hand window down? A. No, sir.

Q. It was not down? [69] A. It was not down until I heard the siren. Then I rolled the window down.

Q. Did you first hear the siren at Rittenhouse Street? A. Yes, sir.

Q. Then you put your left window down? A. Yes, sir.

Q. With reference to your answer as to the speed of the fire engine, I believe you indicated it was going 30 to 35 miles an hour when you first saw it.

THE COURT: Just a moment. He has already answered that. Don't repeat questions.

MR. QUINN: Your Honor, there is a point of –

THE COURT: You have asked that question, he has answered it. Please don't repeat.

MR. QUINN: Your Honor, I would like to ask him this question with the Court's permission:

BY MR. QUINN:

Q. Mr. Stratford, was there any change in the rate of speed of the fire vehicle upon or just before it entered the intersection? A. I couldn't tell that, sir.

Q. Again with reference to Third Street, do you recall whether there were any vehicles parked on the west side of [70] Sheridan Street south of its intersection with Third? A. There is parking permitted there, but I don't recall whether there were cars there or not.

Q. I would like to show you what has been marked into evidence Defendant's Exhibit No. 1, which is a scene – or ask you if you can identify this picture or are familiar with it? A. Yes.

Q. Are you familiar with Sheridan Street on that picture which would indicate the direction that the fire truck was coming from? A. Yes, sir.

Q. Where would that be? A. On the right side.

Q. It would be along beside the American TV Store? A. Yes, sir.

Q. I wonder if you could indicate the approximate place that you first noted, on the picture, that you first noted the fire truck? A. The one that was in the impact?

Q. Yes, sir. A. About middle ways, right here, sir.

Q. That would be your location? A. Yes, sir. The fire truck location?

[71] Q. Yes, sir. A. When he passed the building line there.

Q. You do not – do you have any recollection as to the parked cars that were along the west side of Third Street south of the intersection? A. I know it is permitted, but I don't recall if cars were along there.

Q. And it is your estimate that the distance from the building line to the street or to the roadway would be about 25 feet? A. That is what I estimate, yes, sir.

Q. I wonder if I could have you mark the place that you indicated, the approximate place that you were when you observed the fire engine? And I believe that would be the place where you observed both fire engines, is that correct? A. It would be approximately right in this area right here, right around this car right here.

Q. The third or fourth car back? A. Third or fourth from the end. Approximately right there.

Q. Can you make a mark with that? A. Right there (marking).

Q. As you were sitting there watching the fire engines [72] do you recall whether there were any school children in the area? A. After the accident I recall school children in the area.

Q. Do you recall seeing any before the accident took place? A. No, sir, I did not.

MR. QUINN: That is all I have, Your Honor.

MR. BOYNTON: I just have one question, Your Honor.

REDIRECT EXAMINATION

BY MR. BOYNTON:

Q. Do you know in length of time how long you had the second fire engine in view before impact? A. The length of time? Really I couldn't say.

Q. You have no idea in length of time? You don't have to be precise. A. I don't know the length of time but I know I could say approximately they run approximately a half a block apart.

Q. No, you misunderstood my question. Let me rephrase it. How long you had in view from the time you first saw the second fire engine to the time of impact, what time elapsed during that period when you first saw the fire engine, the second fire engine, and the impact took place.

THE COURT: Do you mean what length of time there [72] was between the moment that the first engine passed and the second engine passed?

MR. BOYNTON: No, Your Honor. What I mean is the length of time that passed when Mr. Stratford first saw the second fire engine to the time of the impact.

THE WITNESS: Well, I would say two or three seconds at the most; something like that.

MR. BOYNTON: I have no further questions.

MR. QUINN: Your Honor, with reference to –

RECROSS-EXAMINATION

BY MR. QUINN:

Q. You said that you knew the vehicles run a half a block apart. A. I estimated that they were running approximately a half a block apart.

Q. Did you know this when you stopped? A. Yes, sir.

Q. And then you knew – you had knowledge that another fire engine would be coming through? A. As a rule they run in twos in the District, yes, sir.

Q. And you knew this? A. Yes, sir.

Q. You knew this before this accident happened? [74] A. Yes, sir.

Q. So, in effect, when you saw the first one you knew another one would be coming? A. Yes, sir.

THE COURT: Don't repeat the same thing, Mr. Quinn, you are just wasting time.

MR. BOYNTON: I have no further questions, Your Honor. May this witness be excused?

THE COURT: The witness may be excused.

MR. BOYNTON: Your Honor, I have called my last witness, or my next witness is for the afternoon session, but I have certain regulations that can be introduced at this time.

THE COURT: Suppose you come to the bench, then.

(At the Bench:)

MR. BOYNTON: Pursuant to the pretrial order, I would request to read 99(c) of the traffic regulations.

THE COURT: Is that –

MR. BOYNTON: Full time and attention.

THE COURT: Of course there is no evidence that the driver failed to give full time and attention. However, I think there can be an inference from circumstances because if the driver had given full time and attention the driver would have stopped.

[75] MR. QUINN: I don't think necessarily –

THE COURT: It may not be necessarily so, but I think it is a permissible inference. I will allow Traffic Regulation 99(c).

MR. BOYNTON: The next one would be 50(a), which is failure to yield to an authorized vehicle. It is actually 50 (a)(1).

THE COURT: You want to omit paragraph (2), don't you?

MR. BOYNTON: Yes, Your Honor.

THE COURT: You only want paragraph (a) (1), don't you?

MR. BOYNTON: That is correct, Your Honor.

THE COURT: Very well. What is next?

MR. BOYNTON: Section 21(a).

THE COURT: Very well.

MR. QUINN: Your Honor, I don't think this is a case of reckless driving. There isn't any evidence of reckless driving in this case.

THE COURT: Of course it is not conclusive, but I think failure to slow down when approaching a fire engine that has its siren going and its lights blinking might be deemed to be reckless driving. Whether it is or not is for the jury [76] to decide. I will allow that.

MR. BOYNTON: That is all the regulations I have, Your Honor.

THE COURT: Very well. You may read them to the jury.

MR. QUINN: Your Honor, I would like to note in the record, I would like to note an objection to 50(a)(1) on the grounds that this requires –

THE COURT: Very well, your objection is noted. Objection overruled.

(In Open Court:)

MR. BOYNTON: May it please the Court, ladies and gentlemen of the jury, at this time there are certain traffic regulations that are being introduced in behalf of the plaintiff. I would like to read these to you at this time.

The first one is Section 21(a):

> Reckless Driving – Any person who drives any vehicles upon a highway carelessly and heedlessly in willful or wanton disregard of the rights or safety of others, or without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or [77] property, shall be guilty of reckless driving.
>
> Section 50(a)(1) – Operation of Vehicles on Approach of Authorized Emergency Vehicles:
>
> Upon the immediate approach of an authorized emergency vehicle making use of audible and visual signals meeting the requirements of Section 131.1 of these regulations, or of a police vehicle properly and lawfully making use of an audible signal only, the driver of every other vehicle shall yield the right of way and shall immediately drive to a position parallel to, and as close as possible to, the right-hand edge or curb of the roadway, clear of any intersection, and shall stop and remain in such position until the authorized emergency vehicle has passed, except when otherwise directed by a police officer.

Section 99(c): An operator shall, when operating a vehicle, give his full time and attention to the operation of the same.

I have no further witnesses at this time, Your Honor.

THE COURT: Will you come to the bench, please.

(At the Bench:)

THE COURT: Your client is here. You are not going to [78] have him testify?

MR. BOYNTON: I could put him on now but his testimony would run over –

THE COURT: That doesn't make any difference. Just because a witness' testimony can't be completed by recess doesn't mean that it shouldn't be started.

MR. BOYNTON: I have a doctor coming at a time set. May this testimony be interrupted when he comes in?

THE COURT: You may make the appropriate request at the time.

MR. BOYNTON: Thank you.

(In Open Court:)

WILLIAM J. MARSH

Plaintiff, called as a witness, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BOYNTON:

Q. Will you please state your full name and address? A. William J. Marsh.

Q. Where do you live, Mr. Marsh? A. 10732 Ken Locke Road, Silver Spring, Maryland.

Q. Would you state where you are employed, please? A. Myer M. Emanuel, Jr.

[79] Q. In what position are you so employed? A. Senior staff accountant.

THE COURT: You are an accountant by profession?

THE WITNESS: Yes.

BY MR. BOYNTON:

Q. Are you the son of Margaret V. Marsh? A. Yes.

Q. Did she have any other children that are now living? A. Yes.

Q. Who is that? A. Richard W. Marsh.

Q. Mr. Marsh, while your mother was living did you handle any of her business affairs? A. Yes, I did.

Q. In what capacity did you handle those affairs? A. Well, I would write her checks on many occasions and I would fill out her income tax returns.

Q. You said you wrote checks for her. In what capacity did you write checks for her? A. She opened one bank account and gave me power of attorney.

Q. How long prior to her death did you have such power of attorney? [80] A. Almost immediately after my father's death.

Q. When was that? A. 1959.

Q. Are you familiar with the income that your mother had while living? A. Yes.

Q. Could you tell the Court and jury, please, what income she had? A. She had her own pension. She also had a pension from my father, plus she had certain other investments?

Q. And you were familiar with those sources of income? A. Yes.

Q. Do you know what they totaled in the year preceding her death? A. Not completely, but I would say around seven, eight thousand dollars.

THE COURT: That was the income?

THE WITNESS: Yes.

BY MR. BOYNTON:

Q. Was any member – were you or your brother or their families dependent upon your mother for support? A. No, sir.

Q. Did your mother give contributions to you and your [81] family and to your brother and his family? A. Yes, sir.

Q. Could you tell the Court and jury what the nature of these contributions were? A. She would give us cash and things like that or buy stock jointly with her and either one of us. Whatever she bought for one she would buy for the other.

Q. Did your mother ever pay for certain insurance premiums? A. Yes, she did.

Q. What premiums were those? A. She paid for some of my life insurance premiums and some of my retirement insurance premiums.

Q. Did she pay for premiums of insurance for your brother? A. No, she didn't.

Q. Could you explain why? A. Because he worked for the Government and they have a retirement plan, and down at our firm we do not.

Q. Did your mother ever pay any dues on your behalf or your brother's behalf? A. Yes, to the AAA's.

Q. The AAA's, you are referring to the American [82] Automobile Association? A. Yes, sir.

Q. Did your mother make any other payments to you on your children's behalf? A. Yes, she gave them birthday presents and Christmas presents and Easter presents and on numerous occasions she would bring clothes and so forth when she came back from her various trips.

Q. Did your mother ever pay for any education of your children? A. Yes, for my daughter.

Q. Could you tell us what type of education that was? A. She paid for her to go to kindergarten at the Cynthia Warner School in Takoma Park, Maryland.

Q. And for how long a time did she do that? A. One year.

Q. How many children do you have? A. Two.

Q. How many children does your brother have? A. One.

Q. You mentioned various trips your mother took. Could you describe what type activity your mother did in her retirement? [83] A. Well, she used to go off for a month—

MR. QUINN: Your Honor, I would note an objection to this. I don't see the relevance of it. I object on the basis of relevancy.

THE COURT: What is the ground of your objection?

MR. QUINN: Relevance.

THE COURT: How is that relevant? How were her activities relevant?

MR. BOYNTON: Your Honor, we are still pursuing a survival action in this case and I think a disability factor is important and to establish what type of activity and how active the woman –

THE COURT: Of course the disability here only lasted two hours, didn't it?

MR. BOYNTON: Your Honor, we haven't taken this point up legally but I take the position that the disability, under the case law in this jurisidiction, is compensible beyond the two hour life span.

THE COURT: You mean you contend so.

MR. BOYNTON: That is correct, Your Honor.

THE COURT: Of course the statute in this jurisdiction is that there can be no recovery for pain and suffering for personal injuries sustained if a person dies prior to a [84] trial.

Is it the Lazarus case that held that, nevertheless, that doesn't prevent a recovery of damages for disability caused during the period between the sustaining of the injuries and death. But here the period was only two hours.

There can be a very substantial item there if there is a considerable period of disability, like a month or a year or two; but what is the basis of your contention –

MR. BOYNTON: Our position is this, Your Honor, that under the statute, recognizing it eliminates pain and suffering, but under the holding in Hudson v. Lazarus we are entitled to disability that the decedent could have brought had she lived.

THE COURT: Oh, no, I think the Lazarus case means that you can recover for disability while the disability lasted and not for the entire life expectancy.

MR. BOYNTON: Your Honor, I believe in the Hudson v. Lazarus case the gentleman there was on crutches at the time of his death, and they said he could recover for the length of his disability. They measured it by an economic wage standard in that particular case. But that was disability that would have extended beyond death. I mean had he lived, is what I mean.

THE COURT: Just a moment. Is it your contention [85] that in the Lazarus case there was an allowance of disability for a period beyond the death?

MR. BOYNTON: Yes, Your Honor, it is.

THE COURT: Have you got the case there?

MR. BOYNTON: I don't have it because I didn't expect it to come up at this time.

THE COURT: I think you better be ready to present that question right after the noon recess, both of you, because I am inclined to the view that what is meant by disability is disability while it lasted.

MR. BOYNTON: I shall, Your Honor.

THE COURT: However, I will allow this question. I think this question might bear on other aspects of the matter. Objection overruled.

MR. BOYNTON: I shall rephrase the question because, frankly, I forgot exactly how it was.

THE COURT: Suppose we have the question read. Do you have the citation to the Lazarus case?

MR. BOYNTON: Yes, Your Honor, 95 U.S. App. D.C. 16.

MR. QUINN: Your Honor, my contention on that point is this case is controlled by the Court's opinion, Your Honor's opinion in Coleman v. Moore, which is at 108 F. Supp. 425.

[86] THE COURT: Thank you. You may proceed.

MR. BOYNTON: I believe the Reporter was going to read the question.

(The Reporter read the question as follows:

"You mentioned various trips your mother took. Could you describe what type activity your mother did in her retirement?")

THE WITNESS: She would go off at times on three to four month trips. There would be times when she would take an extended trip lasting from three to four months, such as go out to Hawaii or taking a train and go out to Vancouver and then taking a boat to Alaska and come all the way back across Canada on a train and back home.

BY MR. BOYNTON:

Q. How long had your mother been retired prior to her death? A. Five years.

Q. Which would be –

THE COURT: What had she done before retirement?

THE WITNESS: She was a D.C. public school teacher and she worked for the allotment allowance section of the Treasury, I think it was, during World War I.

[87] BY MR. BOYNTON:

Q. At this time, Mr. Marsh, I am going to hand you certain checks which I would like you to identify, if you would,

THE COURT: Well, I don't think you have to go through the trouble of formally identifying the checks. Just show them to Mr. Quinn.

Were they marked at pretrial?

MR. BOYNTON: No, Your Honor.

(Pause.)

MR. QUINN: Your Honor, as to these checks, in going over these checks it might be that during the noon hour we might be able to resolve the question of which checks will be utilized here.

THE COURT: Suppose you do that during the noon recess. We would be adjourning for lunch in a minute or two, anyway. Suppose we do that now.

* * *

[88] (The following proceedings were had out of the presence of the jury:)

THE COURT: Before the jury is brought in I want to say that during the noon recess I have examined the authorities that each of you has cited.

Coleman v. Moore was decided by me in 1952 and I held in that case as follows:

> "Whether there can be any allowance for the disability itself as distinguished from pain and suffering caused thereby in case of a protracted illness is a question not presented here for decision. In this case the deceased lived less than an hour after the accident. No pecuniary damages were sustained."

Now Hudson against Lazarus came two years later. When I decided Coleman against Moore the question as to whether

the survival statute allowed recovery for disability had not been passed upon and I felt that I should leave it open because it was not presented in the case. I am always mindful, I might say informally, of something that Chief Justice Stone said to me years ago. He said a judicial opinion should not decide anything except the precise point that has to be ruled [89] upon. I have tried to follow it.

In Judson v. Lazarus, 95 App. D.C., it is stated that permanent loss of earning power is usually the chief economic harm caused by a permanent injury. If Hudson in his lifetime had recovered judgment in this action his damages would have included an allowance for prospective loss of earnings during his normal life expectancy discounted to present worth and with such other adjustments as the facts may require.

Now the fact in that case was that the deceased was in the following condition:

> "Before the accident Hudson worked as a laborer, was in good health and had no disabilities. After the accident he was stone deaf and could not walk without crutches.
>
> "A man who cannot hear or walk because of an accident has a physical injury. Unless such disabilities are pain and suffering the survival act does not accept them. We think a disability is not in itself pain and suffering. A disabled man may or may not suffer pain. Even if he does, after his death his administrator cannot recover for his pain and suffering, but in our opinion his [90] administrator may recover for his disability."

Now in that case there was proof of a specific disability that was permanent and in that case also the deceased lived for two years after the accident, so that his disability became ascertainable.

Of course I have to follow that ruling. Actually, Hudson against Lazarus represents an effort, and in my humble judgment a very commendable effort, to get away from the harshness of our survival statute. Our survival statute is unique in

excluding pain and suffering. It gives an undeserved advantage to a defendant if the injured party happens to die before the trial. My understanding is that there is no other jurisdiction in this country that has such an exception.

Anyway, Hudson against Lazarus construes that you can recover for disability separate and apart from pain and suffering, but in that case the disability was established. Here the deceased lived for two hours after the accident. It seems to me that it would be speculative to try to make a finding as to the nature and the extent of the disability that the deceased would have sustained if the deceased had lived, but I shall be very glad to hear counsel on that.

MR. BOYNTON: May it please the Court, my intention in proving this disability is to have a doctor testify from –

[91] THE COURT: Don't tell me what your opinion is; tell me what you contend;

MR. BOYNTON: What we contend is that a doctor that will be a witness in this trial can review the hospital records which document what her injuries were and therefore testify to what her disability will be.

THE COURT: If you can establish by medical testimony, which seems rather problematical to me, but if you can establish by medical testimony with some approach to precision as to what disability she would have suffered had she lived, you may be in a position to take advantage of the ruling in Hudson against Lazarus; but unless you do, I don't think that applies.

MR. BOYNTON: The manner in which I intend to do this, to prove the disability, is to take the hospital record and –

THE COURT: You don't have to predict now just what you are going to do. I am just pointing out what I conceive to be the rule. Would you like to be heard on this?

MR. QUINN: Your Honor, my position is, under Coleman v. Moore, where you have a death, say, within an hour or as in this case, two hours, there isn't any way that the [92] disability can be ascertained or considered, and the distinction is clear because Hudson v. Lazarus is a situation

where this man was on crutches and they knew what was wrong with him.

THE COURT: In Hudson against Lazarus the deceased lived for two years and there was an ascertainable disability. I don't think the interval of time is the governing factor. The question is, is there an ascertainable disability.

It does seem to me that if the person lives two and a half or two hours after the accident it would be pretty difficult to determine an ascertainable disability; but if the doctors can do it, it is open to the plaintiff to do it.

MR. QUINN: Your Honor, as I understand the proffer in this case, at least as far as the testimony, the doctor would talk with reference to how long it would have taken the decedent to recover from her injuries, which I don't think equates with disability.

THE COURT: My ruling is as follows, gentlemen: that under the survival statute there may be a recovery for damages for disability even beyond the time that the injured party lives; it may be recoverable for the life expectancy of the injured party even if the injured party dies before the trial. However, there must be some ascertainable and defined disability.

I can conceive difficulties of proof where a [93] person lives only two hours as distinguished from a person who lives two years after the accident, because during the two year period the disability became crystallized and ascertainable. However, if the plaintiff is in a position to present evidence and not mere speculation as to what ascertainable and definite disability the deceased would have suffered from if the deceased had not died, I think that would come within the rule of Hudson against Lazarus.

Now, is there anything else, gentlemen, before we bring in the jury? You may bring in the jury.

(The jury resumed the jury box.)

THE COURT: You may proceed.

MR. BOYNTON: Your Honor, as I mentioned to you before lunch, I had a doctor that was going to be here at approximately this time and I would like to request permission that he be able to testify now.

THE COURT: You may call him now if you wish.

MR. BOYNTON: Dr. Hunter.

THE COURT: In other words, you want to withdraw the witness.

MR. BOYNTON: At this time, yes, Your Honor.

THE DEPUTY MARSHAL: He is not here yet.

[94] MR. BOYNTON: I will recall Mr. Marsh. Your Honor, at the luncheon break plaintiff's counsel discussed with defendant's counsel concerning these checks and he is willing to stipulate that these checks are authentic and were written by the parties indicated.

THE COURT: Thank you. I think that will help matters and shorten technical proof.

MR. BOYNTON: At this time I would like to have these checks marked plaintiff's for identification and introduced into evidence. I have three separate sections representing three different years.

THE COURT: Let them be admitted.

(Group of checks, 1961, marked Plaintiff's Exhibit No. 2 and received in evidence; group of checks, 1962, marked Plaintiff's Exhibit No. 3 and received in evidence; group of checks, 1963, marked Plaintiff's Exhibit No. 4 and received in evidence)

WILLIAM J. MARSH

resumed the stand and testified further as follows:

THE COURT: These are checks written by whom to whom, or rather, by whom to whose order?

[95] MR. BOYNTON: These are checks written by the plaintiff, William J. Marsh, by the order of his mother. They are written to various sources, however, which he will testify to.

THE COURT: Are you the older of the two sons?

THE WITNESS: No, sir.

THE COURT: But you were handling your mother's affairs?

THE WITNESS: Yes, sir.

THE COURT: Because you are an accountant?

THE WITNESS: Yes, sir.

BY MR. BOYNTON:

Q. I will hand you, Mr. Marsh, Plaintiff's Exhibits 2, 3 and 4. Referring to Plaintiff's Exhibit No. 2, first of all, would you please tell the Court and jury the individual checks, for what amount and why they were written and by whom they were written? A. The first check is for $309.46, written by myself under her authority, to me, which was a gift, mainly to pay insurance.

The second check is for $26, again written to me by me, under her order, for AAA membership.

[96] The next check was written by my mother to Snyder's White Oak Hardware, Inc., which was a gift to my brother.

THE COURT: How much was that for?

THE WITNESS: $195.60. The next check is for $26, written to Louise W. Marsh, and it was for AAA membership for my brother and his wife.

The next check is for $430, written to American Telephone and Telegraph, and it was a right to buy more stock based on the number of shares that we held, and it was written by my mother and the stock was put in her and my brother's name.

Then there is a similar check written by me, under her authority, to American Telephone and Telegraph, to put the same number of shares in joint ownership with her and myself.

BY MR. BOYNTON:

Q. Would you refer to Plaintiff's Exhibit No. 3. Please do the same for those checks.

MR. QUINN: Your Honor, I wonder if we could have the year of these checks.

THE COURT: I think that would be helpful.

THE WITNESS: The first check is $10, written by me to me, under her authority, for my daughter's birthday.

Then there is a check for $150, written by me under [97] her order, to me, as a gift.

Then a check written by her to me for $30 as a gift.

Also another check written by me, under her authority, as a gift to me for $30.

The next check is for $90, written to me, under her authority, as a gift to me mainly to pay tuition, to pay one installment on tuition on the school, which was $70 a month for 10 months.

Another check for $70; another check for $70.

Then a check for $283.28 to pay my two life insurance policies.

Another check for $70 for school tuition.

A check for $106, which represented $70 for school and $26 for AAA's.

A check for $75 for preparing her tax return.

And a check to Louise W. March, written by Margaret Marsh, for her AAA membership.

Q. Would you please refer to Plaintiff's Exhibit No. 4. A. Plaintiff's Exhibit No. 4 for the year 1963. $10 for Ruth's birthday, written by me to me, under her authority.

Another $70 for school.

Another $70.

$70 again.

[98] A check for $20.

Another check for $70.

A check written by me to me, under her authority, for $125.

A check for $283.28 to pay the insurance again.

A check for $50 as a gift.

A check for travel insurance to the National Travel Club for me for $20.

Another check written by her for $70 for the schooling.

Q. Mr. Marsh, you mentioned that there was a stock purchase by your mother that was exercised? A. Yes, sir.

Q. Were there any other stock transactions that were similar –

THE COURT: Before you leave this, I wonder if you wouldn't like to have them totaled up.

BY MR. BOYNTON:

Q. Would you refer, please, to Plaintiff's Exhibits 2, 3 and 4 by year and read the total amounts that those checks represent? A. For 1961 the amount to me was $650.46 and to my brother $410.70.

[99] THE COURT: Altogether about $1,000?

THE WITNESS: Yes. For 1962 there is $1,062.28 to me and $78 to my brother.

THE COURT: How much altogether for the two?

THE WITNESS: $1,140.28. And Plaintiff's Exhibit 4, for 1963, was $858.

BY MR. BOYNTON:

Q. Mr. Marsh, were there any other stock transactions similar in nature to those that you have testified? A. Yes, sir, there was also a purchase of stock of PEPCO.

Q. Do you remember the amount? A. Yes, it was $39 a share and it was four shares that was joint for my brother and her and joint for myself and her.

THE COURT: How much money was involved?

MR. BOYNTON: $156 total and there was a survivorship, so $78 would be the amount there.

THE COURT: I meant how much was involved in the purchase of the PEPCO stock.

MR. BOYNTON: $156.

Q. Was there any other stock transaction? A. Yes. She also purchased in a new company known as [100] Womens Life Founding Corporation, which was organized as the Womens Life Insurance Company of America, at which time, in '61, she bought 10 shares of stock for each of us at a cost of $50 and this stock was not joint with her.

Q. That was individual ownership? A. With our wives.

Q. In addition to these amounts that you have testified to were there any cash amounts that your mother gave you? A. Yes, sir.

Q. Would you be able to testify, please, how much that would amount to per year? A. To me it would amount to around $750 a year.

MR. QUINN: Your Honor, I would object to this on the grounds it is speculative and self-serving to this witness.

THE COURT: I don't see where that is an expectancy. That asks for past transactions. Perhaps you misunderstood the question.

MR. QUINN: My objection to it was on the grounds that it is speculative and it is self-serving to this witness.

THE COURT: This asks the witness to state how much his mother had contributed in cash.

MR. QUINN: Yes, and as I understand it he has – this is purely his estimate of the amount of money.

[101] THE COURT: Of the amount in the past that had been paid in the past. Well, what's wrong with that?

MR. QUINN: I believe it is for one year, 1961.

THE COURT: What is your objection?

MR. QUINN: My objection to it is it is speculative and self-serving to this witness.

THE COURT: How is it self-serving? That is what I want to know.

MR. QUINN: Because, Your Honor, it has a bearing on the amount that was given each year to the brothers.

THE COURT: That doesn't make it self-serving. It asks this witness to state how much their deceased mother had given each of them. That is not self-serving. Objection overruled. I think counsel should be sure of his ground before he interposes an objection. Have you got the question or do you want to have it read?

THE WITNESS: I have the question, thank you.

THE COURT: Very well, you may answer.

THE WITNESS: It would amount to about $750 a year.

THE COURT: You mean in cash over and above these checks? [102]

THE WITNESS: Yes, sir.

THE COURT: For how long a period?

THE WITNESS: Ever since my father died, for the four years that she survived him.

BY MR. BOYNTON:

Q. Could you tell the Court and jury on the occasion that these cash amounts would be given to you and for what

purpose? A. The two main times they were given to me were times when we would go up to Pennsylvania for the weekend. We would take her up anywhere from four to six times a year because I maintained an apartment up there that we used to go away on the weekends, and at times she would go along and at such times as she went she would give me anywhere from $50 to $100 to pay for meals and things we bought the kids and so forth. Then on other occasions when we'd go down and take her out to dinner she would give us $25 to $30 to pay for dinner and to buy them toys and so forth at the five-and-ten when we would go shopping after dinner.

MR. BOYNTON: At this time, Your Honor, I would like to have marked for identification and introduce into evidence a funeral bill that counsel has stipulated to.

THE COURT: That is the funeral bill amounting to [103] $1,98.80. [$1,988.00]

[Funeral bill marked Plaintiff's Exhibit No. 5 and received in evidence.]

MR. BOYNTON: I would also, Your Honor, like to have marked for identification and introduce into evidence the hospital bill, Providence Hospital.

THE COURT: Let it be admitted. That is $96. Hospital bills run up very fast, don't they. Probably this little lady was in Providence Hospital less than two hours.

[Hospital bill marked Plaintiff's Exhibit No. 6 and received in evidence.]

BY MR. BOYNTON:

Q. Mr. Marsh, I hand you Plaintiff's Exhibits 5 and 6 and ask you, as the executor of the estate of Margaret V. Marsh, whether or not those bills were received and paid? A. Yes, sir.

MR. BOYNTON: I have no further questions, Your Honor.

THE COURT: Mr. Boynton, I notice you put in a hospital bill. Are there no doctor's bills?

MR. BOYNTON: No, Your Honor, there are not. Your Honor, I am just informed by the Marshal that Dr. Hunter

has arrived, and I am through with my direct examination of Mr. Marsh. I wonder if I could excuse him or if Mr. Quinn would agree to excuse his cross-examination until Dr. Hunter testifies.

THE COURT: You mean to suspend the cross-examination. Is there any objection?

MR. QUINN: No objection, Your Honor.

THE COURT: Very well, you may do so.

OSCAR B. HUNTER

called as a witness by Plaintiff, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BOYNTON:

Q. Would you state your full name and address and profession, please? A. I am Dr. Oscar B. Hunter. My address is 915 - 19th Street, Northwest, Washington.

Q. Doctor, would you describe for the Court and jury your educational background?

THE COURT: What is your occupation, Doctor?

THE WITNESS: I am a physician and a pathologist, Your Honor.

THE COURT: Do you wish to qualify the doctor as a specialist or as a general practitioner?

MR. BOYNTON: As a specialist, Your Honor.

THE COURT: In what specialty?

MR. BOYNTON: Pathology.

THE COURT: Will the doctor's qualifications as a pathologist be admitted, Mr. Quinn?

MR. QUINN: Yes, Your Honor.

THE COURT: Very well. That will eliminate asking the doctor to give his autobiography.

BY MR. BOYNTON:

Q. Doctor, did you have occasion to treat as a patient Mrs. Margaret V. Marsh? A. Yes, I did.

Q. Do you know when she first came to visit you? A. Not precisely, but it's easily six or seven years ago.

Q. And for what purpose did she seek your— A. She came to me for a blood problem, referred by her local phy-

sician, and she had at the time a leukemia, a chronic lymphocytic leukemia.

Q. Could you describe that condition for us and what type of disability, if any, it would render? A. Well, chronic lymphocytic leukemia is a condition of the blood in which the patients live for quite a protracted period of time, but they do have sometimes an anemia, sometimes an increased white blood cell count, and they occasionally have enlarged lymph nodes in their neck and the rest of their body. The disease goes for varying periods of time without treatment. The disease may be rapid. For chronic lymphocytic leukemia rapid would be two or three years. Some patients live as long as 30 or 35 years with the disease. The average patient lives on the average of 10 years. But it varies very considerably in severity and the degree of problems with this blood disease.

Q. Referring to Mrs. Marsh, do you recall what the severity of the problem with her was in approximately 1963? A. Well, her condition was relatively mild and only required treatment from time to time. We followed her on a month to two month interval and on most occasions her blood was quite satisfactory and she got along quite well without any real severe problems.

Q. How would you describe her general physical condition? A. Her general physical condition was quite good. She [107] was a robust woman, large, healthy. She was very active physically and she indulged in a great deal of physical exercise. She kept herself in good shape. She went to health resorts for that specific purpose, as a matter of fact.

Q. Would you be able to say what her life expectancy might have been in 1957? A. Well, from a medical point of view—and that is the only position I would be in—her life expectancy was good, and it's very difficult for a doctor to put any figure, any number on a particular patient. An actuary for insurance purposes can put on only what the average person is going to do at a certain period of time. But Mrs. Marsh was healthy, in good condition. There was

no condition that would cause her imminent severe illness or imminent death. So I would say that she had an expectancy of what the average person at that age would be and this would average around five to seven years.

Q. Dr. Hunter, have you reviewed the medical records surrounding the death of Mrs. Marsh? A. Yes, I did. I did that some little while ago.

MR. BOYNTON: At this time I would like to have marked for identification and introduce into evidence the [108] medical records of Providence Hospital. They have been seen by counsel.

THE COURT: Mark it for indentification, but you better show it to Mr. Quinn. If you wish to take a few moments to look it over before it is introduced you may do so. You may take it to the counsel table, sit down and go over them.

MR. QUINN: Yes, Your Honor.

THE COURT: Is the exhibit that you are tendering, Mr. Boynton, the hospital record?

MR. BOYNTON: Yes, Your Honor.

THE COURT: You really should have shown it to Mr. Quinn in advance of the trial.

MR. BOYNTON: I was under the impression that he had. It was stipulated to in the pretrial.

THE COURT: What was stipulated was that it may be admitted in evidence without formal proof. Have you seen it before?

MR. QUINN: I have not, Your Honor.

THE COURT: We have been trying to get counsel to do this, to exchange exhibits outside of court or give each other an opportunity to see them outside of court so the jury [109] and the Court wouldn't have to sit back and waste time. Five minutes now, five minutes later, and so on, it all mounts up.

MR. QUINN: No objection, Your Honor.

THE COURT: Very well, let it be admitted.

[Providence Hospital records marked Plaintiff's Exhibit No. 7 and received in evidence.]

BY MR. BOYNTON:

Q. In reviewing these hospital records, Dr. Hunter, were you acquainted with the injuries that Mrs. Marsh received? A. I understand that Mrs. Marsh was in an automobile accident and that she received multiple fractures—

THE COURT: Just a moment. The question is, were you acquainted with them.

THE WITNESS: I beg your pardon. Yes, I am.

Q. Would you tell us, please, what those injuries were? A. The injuries that I reviewed were multiple fractures of the ribs with a resulting puncture of the lung and a release of blood into the chest cavity.

Q. Were there any other injuries that you recall at this time? A. I think there were—I forget whether there was an injury to the skull and the pelvis. I know there was a [110] fractured pelvis in addition.

Q. Realizing that you were acquainted with the deceased Margaret V. Marsh and realizing what injuries she received as a result of this accident, do you have an opinion as to what disability this would have rendered to Mrs. Marsh?

MR. QUINN: I would object, Your Honor. I don't think a proper foundation has been laid.

THE COURT: The witness has testified that the deceased had sustained multiple fractures of the ribs and a punctured lung, but then he wasn't sure about the others, according to his answer. He wasn't sure about the other injuries. It seems to me that that fails to give sufficient foundation for your question, unless you confine it to the injuries that the doctor said he was sure of, which was a fracture of the ribs and a punctured lung.

MR. BOYNTON: Would it be possible, Your Honor, to refresh the doctor's recollection with the hospital report?

THE COURT: You have a right to do that if you can do it in a permissible form.

BY MR. BOYNTON:

Q. I hand you, Doctor, Plaintiff's Exhibit No. 7, which is the hospital report, and ask you if it refreshes your recollection as to the injuries that you reviewed? [111] A. I

am certain about the fracture of the pelvis. And the injury to the skull in the scalp–

THE COURT: Is it the scalp or the skull?

THE WITNESS: Scalp, Your Honor.

THE COURT: That is not a permanent injury, is it?

THE WITNESS: Well, it heals, is that what you mean, Your Honor?

THE COURT: Yes, that is what I mean.

THE WITNESS: Yes, that will heal. So will a fractured skull.

THE COURT: Was there a fractured skull or only a–

THE WITNESS: There was a laceration of the scalp. There was no fractured skull on this record here.

BY MR. BOYNTON:

Q. Reviewing that record, Doctor, do you now have an opinion as to what the disabilities would have been of the deceased, Mrs. Margaret Marsh, had she not died as a result of those injuries? A. In other words, if she recovered from these injuries what would be her disability in the healing stage convalescent from these injuries?

Q. That is correct. A. Yes, I think it would be three or six months– [112]

THE COURT: Just a moment. Yes, Mr. Quinn.

MR. QUINN: Your Honor, I don't think the answer is responsive to the question. May we approach the bench?

THE COURT: The doctor understood the question, probably, to mean how long would the convalescence have been and he said three to six months. You may proceed.

MR. BOYNTON: May I see those reports just a moment, please?

THE COURT: What was the cause of death, Doctor?

THE WITNESS: The cause of death, Your Honor, was the chest injury.

THE COURT: The chest injury?

THE WITNESS: Yes, sir.

THE COURT: The–

THE WITNESS: Fracture of the ribs, puncture of the lung, bleeding into the chest cavity and thereby being unable to breathe and take in oxygen.

MR. BOYNTON: Your Honor, I have no further questions of the doctor at this time. [113]

THE COURT: Very well.

MR. QUINN: Your Honor, may we approach the bench, please?

THE COURT: Yes, indeed.

[AT THE BENCH]

MR. QUINN: I would move at this time to strike the doctor's testimony because I don't think he has given any testimony with reference to any disability.

THE COURT: That is no reason for striking the testimony. That may be a reason for criticizing its probative value.

MR. QUINN: He has only—

THE COURT: Motion denied.

[IN OPEN COURT]

THE COURT: Any cross-examination?

MR. QUINN: May I have a moment?

THE COURT: Surely.

MR. QUINN: I have no questions, Your Honor.

THE COURT: Very well. The doctor may be excused. Now suppose we let Mr. Marsh resume the stand and you may conduct your cross-examination if you have any. [114]

WILLIAM J. MARSH

resumed the stand and was examined and testified further as follows:

CROSS-EXAMINATION

BY MR. QUINN:

Q. Mr. Marsh, in your direct testimony with reference to the gifts that your mother had given to you do I understand correctly that you state that she gave you approximately $700 a year in addition to those gifts that you have already enumerated? A. Yes.

Q. By the way of checks? A. Yes, sir.

Q. In the year 1961 was that the year that your daughter entered kindergarten? A. I think so, the fall of '61 I think it was.

Q. And she, in effect, paid for your daughter's year in kindergarten? A. Yes, sir.

Q. And that amounted to a total of approximately $700? A. Yes, sir.

Q. And then after that time your daughter went elsewhere to school? [115] A. To public school.

Q. As I understand, the checks that you have introduced into evidence, that have been introduced into evidence, they would include gifts to both you and your brother, would they not? A. That was given in the forms of checks, yes. I have all her canceled checks for the four prior years to death.

Q. In 1961, '62 and '63, which are the three exhibits we have, these are the total amount that she gave both you and your brother by way of checks? A. Yes sir.

Q. And then you state that in addition to that the amount of money that she gave to you was $700, or was this to both you and your brother? A. No, sir; I have no knowledge what she gave my brother in cash.

Q. Mr. Marsh, referring to your deposition that you gave in this case and specifically referring to page 16 of your deposition, the following question was asked you during this deposition: "Could you approximate the total value of these gifts in a given year? Answer: Anywhere from $500 to $1500." Do you recall that answer? [116] A. Yes, sir.

Q. And then the further question was asked—well, the suggestion was made that you were, in effect, getting more that your brother and the question was—

THE COURT: Ask him whether he said it.

BY MR. QUINN:

Q. The question was asked you: "Looks like you were doing a little bit better than your brother? Answer: Yes. She sent one child to— "

THE COURT: Just a moment. You have a right to ask him whether he was asked these questions and whether he gave these answers; you don't have the right to tell him that he gave these answers.

MR. QUINN: Your Honor, the question——all right, Your Honor.

Q. The question was asked: "Looks like you were doing a little bit better than your brother? Answer: Yes. She sent one child—"

THE COURT: What page are you reading from?

Mr. QUINN: 16, Your Honor. Q. "Yes, she sent one child to the kindergarten [117] which costs $700 alone." Was that the answer that you gave, sir? A. Yes, sir.

Q. Now the estimate of $500 to $1500 would have been the total estimate of all gifts, would it not? A. To me or to both of us?

Q. I assume this is to you because the question is asked of you. A. Yes.

Q. The two checks that were passed to the American Telephone and Telegraph Company were both for $430, is that correct? A. Yes, sir.

Q. And as I understand it, half of that would be yours, is that correct? A. Yes, the one check was for the stock she bought in joint name with her and myself and the other was with my brother and her.

MR. QUINN: Thank you, sir. I have no further questions.

THE COURT: You may step down.

MR. BOYNTON: Call Richard W. Marsh.

MR. QUINN: Your Honor, while the Marshal is getting [118] this witness may we approach the bench?

THE COURT: Yes, indeed.

[AT THE BENCH]

MR. QUINN: I wanted to inquire as to the length of time your case will go on.

MR. BOYNTON: This is my last witness, Your Honor, and I don't plan to keep him very long and I just have two short matters of evidence.

THE COURT: Are you going to have any evidence?

MR. QUINN: The only witness I would have is a young boy who was in school and I have a particular problem of getting him here this afternoon.

THE COURT: What would he testify to?

MR. QUINN: He would testify that he was ont he corner at the intersection, that he saw the accident take place, and he has indications as to——although he was 12——

THE COURT: In other words, he was an eye witness to the accident.

MR. QUINN: Yes, he was.

THE COURT: How old is he?

MR. QUINN: He was 12 at the time this accident happened.

THE COURT: He would be a competent witness.[119]

MR. QUINN: He was a school crossing guard at the time.

THE COURT: Where is he in school?

MR. QUINN: He is at the Ray Bow Junior High School.

THE COURT: Where is that?

MR. QUINN: Out here in northeast. I have a phone number on it.

THE COURT: It would take you an hour to get him here, wouldn't it?

MR. QUINN: Yes. I would want to actually ask the Court if I could put him on first thing Monday morning.

THE COURT: Have you got anything else?

MR. QUINN: No, Your Honor, I have nothing else. He will be my only witness.

THE COURT: He probably wouldn't take very long and we can get the case to the jury before noon on Monday. How much time would you gentlemen want for summing up?

MR. BOYNTON: I would want no more than 25 minutes, Your Honor.

MR. QUINN: I would want no more than that.

THE COURT: That is fine. If you have any requests for instructions ready I will be glad to pass on them this afternoon instead of waiting [120] until Monday. Or haven't you got them ready?

MR. BOYNTON: I am sorry, I do not.

MR. QUINN: I do not.

THE COURT: Very well, We will just recess for the day after the plaintiff rests. I want to give you full opportunity to get your witnesses.

MR. QUINN: Thank you. I appreciate that. I didn't want to take him out of school.

THE COURT: That is in the interest of fairness, although I haven't changed my views from what I said to you right after the mid-morning recess.

MR. QUINN: I understand that, Your Honor, and I don't know whether this has to be in the record, but I want you to know that I contacted at your request and talked with Mr. Anderson of my firm.

THE COURT: I have a very high regard for Mr. Anderson.

MR. QUINN: Your Honor, I, of course, don't agree with the position that you have suggested as far as this case is concerned. Afther further consideration and discussion with Mr. Anderson it was his position that we would not—that the position that we had taken was reasonable; that as far as any further settlement discussions we felt that unless there had [121] been something forthcoming from plaintiff to indicate a figure, that we would not offer anything else, and I think the demand the plaintiff now stands at is $7,000 and we will not consider anything further.

MR. BOYNTON: That is correct, Your Honor.

THE COURT: What are you willing to do under the circumstances?

MR. BOYNTON: We feel that this figure is fair and reasonable under the evidence and the damages attempted to be proved, Your Honor.

THE COURT: Of course, as I indicated to you, your weakness is the measure of damages. When you get a bread winner in a family killed, that is one thing, but here the situation is rather different, although I want to say this, we had a death case where a grandfather had been making large payments to his grandchildren and considerable payments to a grown up son and there was a verdict for something in the

neighborhood of forty or fifty thousand dollars. Of course those people were wealthier people than these, but here you have a lady who had an income of $70,000 a year—isn't that what her income was?

MR. BOYNTON: Seven thousand.

THE COURT: I thought you said seventy. Seven thousand. [122]

MR. QUINN: I think with reference to the life expectancy, as Dr. Hunter has indicated it, and the gifts that they could expect, it is necessarily restrictive to some extent.

THE COURT: The case I had in mind involved an old gentleman where there was that verdict. On the other hand in these cases where the deceased is not a bread winner of a family that he leaves without an income you do have difficulty as to damages. Suppose we finish this up and talk some more after we are finished and excuse the jury.

[IN OPEN COURT]

RICHARD W. MARSH

called as a witness by plaintiff, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BOYNTON:

Q. Would you please state you name and address? A. My name is Richard W. Marsh. My address is 606 Fairlane Drive, Silver Spring, Maryland.

Q. Are you the son of the deceased Margaret V. Marsh? A. I am

Q. Are you married, sir? A. Yes, I am. [123]

Q. Do you have any children? A. Yes, I have one child.

Q. Mr. Marsh, in the years preceding the death of your mother in 1957 was she accustomed to making any cash contributions to you? A. Yes, she was.

Q. On a yearly basis or an annual basis what would you say these amounts totaled per year? A. They would total between $150 and $200.

Q. For what purpose were these cash contributions given to you? A. She very seldom gave us any tangible gift in the sense of an object or anything of the sort. For holidays, an-

niversaries or my birthday, for example, she never gave me less, for example, than $25 and said, "Get something you want, it's better than my getting it for you and taking it back if you don't like it." The same thing for Christmas, our anniversary, Easter, Valentine's Day. She always made a big thing of holidays and they were always accompanied by some sort of a cash gift.

Q. Were there any gifts in the nature of cash that were not given to you on holidays? [124] A. Yes. I maintained a very close relationship with her and I lived about 13 miles from her. She lived in the District, of course. We tried to have her over our house for dinner once a month at least and she never drove a car and I would have to go get her. So the trip was somewhat over 50 miles to get her, bring her out and take her home and come back home.

THE COURT: What is your occupation?

THE WITNESS: I am a mathematician.

THE COURT: Where?

THE WITNESS: I would for the Defense Department.

BY MR. BOYNTON:

Q. You may proceed. A. And on most of these occasions, in fact nearly every time she'd say, "Well, it's been a long trip, you used a lot of gasoline and can I pay for the gas," for example. I attempted to say no, but she always seemed to enjoy doing this and I accepted the money on a large number of occasions but not every time.

Q. Did your mother ever purchase any stock that inured to your benefit while she was living? A. Yes, she did. If my memory serves me correctly, on one occasion she exercised the warrants that were made [125] available by PEPCO Corporation to purchase additional stock which we were holding jointly, and also if my memory is correct on the second occasion she exercised warrants of American Telephone and Telegraph Company to purchase additional stock which was held jointly by the two of us.

MR. BOYNTON: I have no further questions, Your Honor.

CROSS-EXAMINATION

BY MR. QUINN:

Q. Sir, as I understand, the best of your recollection is that your mother's gifts to you would be approximately between $150 and $200 a year cash gifts? A. That is correct.

MR. QUINN: Thank you. That is all I have.

THE COURT: You may step down.

MR. BOYNTON: Your Honor, I have two small items I would like to have marked for identification and introduce. The death certificate.

MR. QUINN: I have no objection, Your Honor.

THE COURT: Let it be admitted. Have you shown it to Mr. Quinn?

MR. QUINN: Yes, I have seen it.

THE DEPUTY CLERK: 8 in evidence. [126]

[Death certificate marked Plaintiff's Exhibit No. 8 received in evidence.]

MR. BOYNTON: The second item, Your Honor, is the mortality table of the Health, Education and Welfare, and Mr. Quinn I believe is going to object.

MR. QUINN: Your Honor, the basis of my objection is the testimony of Dr. Hunter as to the decedent's life expectancy.

THE COURT: I don't follow your objection. Would you mind stating it more concretely? Just what is the objection? I mean what makes this inadmissible as a matter of law?

MR. QUINN: The fact is that I think we had competent medical testimony as to the decedent's life expectancy.

THE COURT: No one is limited to one item of evidence. This is admissible. Objection overruled.

[Mortality tables marked Plaintiff's Exhibit No. 9 and received in evidence.]

THE COURT: Suppose you read just the particular entry in the mortality tables that is pertinent, instead of offering the entire book.

MR. BOYNTON: This is the 1963 edition, the vital [127] statistics of the United States, published by the Uni-

ted States Department of Health, Education and Welfare, Volume 2, Section 5. On page 5-10, Section 5, for a 68 year old white female the life expectancy would be 13.9 years.

THE COURT: Very well.

MR. BOYNTON: Your Honor, that is all I have and the plaintiff rests.

THE COURT: Do I understand that you haven't got your witness available?

MR. QUINN: Yes, Your Honor. I would expect to have him Monday morning, as I indicated to the Court.

THE COURT: You have only one witness?

MR. QUINN: Yes, Your Honor, that is true.

THE COURT: I want to give both parties an opportunity to present all their evidence. I regret that we can't finish this case this afternoon. We should be able to. But under the circumstances I am not going to bar you from bringing your witness on Monday if you can't get him this afternoon. I want counsel to remain after the Court excuses the jury. Ladies and gentlemen of the jury, we are going to suspend further proceedings in this case until Monday morning at 10 o'clock. I think we will be through the first part of Monday morning and then the case will be submitted to you. Let me remind you, over the weekend not to discuss this case with anyone and not to discuss it even amongst yourselves or at home with members of your families. You may be excused at this time and please be back in the courtroom a few minutes before 10 o'clock on Monday morning.

THE COURT: The jury has left the courtroom. You may come to the bench, gentlemen.

[AT THE BENCH]

THE COURT: Now of course this was a horrible tragedy and the lady who drove the car is dead also. There is the old Latin proverb don't speak ill of the dead. She apparently wasn't paying attention or else she thought that when the first piece of apparatus passed that was all there was. Perhaps she had her windows closed. People have no right to keep their windows closed to the extent of not being able to hear from the outside. In other words, it is like

the Landfair case, you have got to see what there is to see. and I presume you have to hear what is to be heard. So, I think you have a pretty good case of liability. But as I said before, your difficulty, Mr. Boynton, is the amount of damages. I want to tell you this, Mr. Quinn, in these wrongful death cases juries sometimes grab a very weak peg to hang verdicts on because juries rather are apt to resent the fact that they can't compensate for sentimental loss. Well, I had a case years ago where a three-day old baby died as a result of negligence in the hospital. The jury returned a verdict for $17,000. I refused to cut it down and I said to counsel I think perhaps the verdict is so large because of the indignation of the jury, but I said it was righteous indignation. The case went to the Court of Appeals and there rested. Of course that was an exceptional case, but there may be other exceptional cases. I would like to know, Mr. Quinn, how much higher you would be willing to go than your prior offer.

MR. QUINN: I was told that the position that we would take was with the demand at $7,000—

THE COURT: We have no demands or formal offers. What are you willing to recommend? In other words, let's forget what the other side is asking. What are you willing to recommend? When you come to the Court you are not playing poker.

MR. QUINN: I know, Your Honor. [130]

THE COURT: It is one thing when you are negotiating with counsel alone but it is another thing when you come before the Court. Of course, if you prefer to go on and fight at arm's length you have a right to do that and you may do so and I am not going to keep on wasting my time.

MR. QUINN: Well, I am not asking you to waste your time, Your Honor. I am merely pointing out the question that was asked me was what could this case settle for. My reply to it had to be $7,000. The response to that was we were not interested in paying $7,000.

THE COURT: I don't care what your response was. I

want to know what you are willing to recommend to your client. Of course you can't commit your people.

MR. QUINN: I would be willing to recommend $4,000 to settle the case.

MR. BOYNTON: I would not recommend that my client take that.

THE COURT: I would be inclined not, myself, if I was in Mr. Boynton's position. Of course I am not going to stop you from recommending it, but I can see the reasonableness of your position. What would you be willing to recommend? Would you be willing to recommend anything less than $7,000?

MR. BOYNTON: No, Your Honor, I would not.

[131] THE COURT: Well, don't be surprised if the jury gives them more than $7,000. They may give less, but don't be surprised if they give more. And this is the kind of a case where if the jury gives a fairly large verdict it would be pretty difficult for the Court to cut it down by requiring a remittur unless it was outlandishly large.

MR. QUINN: I understand that, Your Honor.

THE COURT: Of course, on the other hand, you might get a verdict that you might consider inadequate, too. I can't conceive of a chance of a defendant's verdict. Very well, gentlemen, it does seem to me as though you are at a deadlock.

[At 3:00 p.m. trial stood in recess, to reconvene 10:00 a.m., May 22, 1967.]

[134] **PROCEEDINGS**

[The following proceedings were had out of the presence of the jury:]

THE COURT: I will pass upon the requests for instructions before the jury is brought in. Taking up the plaintiff's requests, I will cover the subject matter of Plaintiff's Request No. 1 in my own way. I will do the same thing with No. 2. I don't think I will give No. 3 or enlarge upon it. I will state very simply what the action is about. As to No. 4, I will cover the subject matter in my own way. No. 5 is

proper and I will give that in substance. But I want to ask you this, Mr. Boynton: Did the deceased leave a will?

MR. BOYNTON: Yes, she did, Your Honor.

THE COURT: Who are the beneficiaries of that will?

MR. BOYNTON: I will have to consult with the executor but I believe the two sons, who are also the next of kin in this wrongful death action.

THE COURT: What I have in mind is, are the beneficiaries of the will the same as the next of kin?

MR. BOYNTON: I am informed they are, Your Honor.

[135] THE COURT: In other words, the same persons would get the benefit of both causes of action, is that it?

MR. BOYNTON: That is correct, Your Honor.

THE COURT: If this were not the fact, of course, I would instruct the jury to bring in a separate verdict on each cause of action, and you are still entitled to that course if you insist on it. On the other hand, I think it would be less confusing to the jury, as a practical matter, to instruct them to bring in one verdict if they find for the plaintiff and aggregating together in one lump sum what they allow for wrongful death and what they allow under the survival action. Would that be agreeable?

MR. BOYNTON: I would prefer that, Your Honor, yes.

THE COURT: And is that agreeable to you?

MR. QUINN: Your Honor, with reference to No. 5, I—

THE COURT: I asked you a question. Suppose you answer the question.

MR. QUINN: No, Your Honor, it is not agreeable from this point of view: that it is my position that the proof that has been offered here with reference to disability is not sufficient under the doctrine of Hudson v. Lazarus and, as a matter of fact, the period of time which Dr. Hunter [136] referred to—

THE COURT: I think you are talking about something else than the question that I propounded to you. Let's assume that the evidence is not sufficient to justify damages under the survival action. Then the jury won't include anything

on that account in its verdict. I will instruct them to bring in separate verdicts. If you want a larger verdict against you that is what you might get.

MR. QUINN: Your Honor, my only problem is this: I do not believe as a matter of law they are entitled to a verdict under count 2 of their amended complaint.

THE COURT: On what ground?

MR. QUINN: On the grounds that the proof that has been offered is, as a matter of law, insufficient because I believe that the testimony—

THE COURT: You have a right to argue that the proof is not sufficient. But there is one thing I do expect lawyers to do and that is to think clearly. The Court asked you a question and you are talking about something else than what the Court asked you.

MR. QUINN: Your Honor, I am trying to state the reasons why I do not think that the jury should return an [137] aggregate verdict. If, as I contend, that as a matter of law they are not entitled to recover under the disability—

THE COURT: No, they are entitled as a matter of law. Maybe the proof is insufficient. That is for the jury.

MR. QUINN: I think there are circumstances where as a matter of law the proof could be insufficient.

THE COURT: Wherein is it insufficient as a matter of law?

MR. QUINN: Because I think here all that has been offered by the plaintiff in this case is that it would have taken the decedent three to six months to recuperate and convalesce from her injury. There has been no specific offer or no proof of what the disability would be or, in effect, as we considered in Hudson v. Lazarus where there was a loss of hearing, where the man was on crutches, where this lasted approximately a year and a half.

THE COURT: I am going to overrule your objection. I am going to submit that to the jury. You have a right to argue that, but that is a question of fact for the jury.

MR. QUINN: Well, I wanted it on the record that I respectfually disagree.

THE COURT: Are you addressing the Court or a [138] notebook? I always dislike to have lawyers say I want something on the record. In other words, you are not interested in conveying your thought to the Court, you are only interested in having it written in a notebook, is that it?

MR. QUINN: No, Your Honor, I am most interested in conveying my thoughts to the Court.

THE COURT: Then don't say on the record.

MR. QUINN: I was merely indicating one of the main reasons—

THE COURT: Are you indicating to the Court or to the notebook?

MR. QUINN: Your Honor, I have indicated to the Court I believe, my position.

THE COURT: I am going to overrule that. I think it is for the jury to decide. I think you have a perfect right to argue there is no proof what the disability would be during the six months' period or so of convalescence, there is no question about that, but that is independent of the question I propounded. I am speaking about the form of the verdict. I think it would be much more practical and less confusing to ask the jury to bring in a single verdict for a single lump sum and indicate to the jury the various items that they may consider or may leave out. [139]

MR. QUINN: May I ask the Court a question?

THE COURT: Yes, indeed.

MR. QUINN: Your Honor, in the form of the verdict are you going to instruct the jury that they should apportion it as to the two sons?

THE COURT: No. The apportionment is required under our death statute only if there is a surviving spouse.

MR. QUINN: Each of these parties are, in effect, a real party in interest, though, aren't they, both of the two sons?

THE COURT: I understand, but our death statute —let's look at it—requires apportionment of damages only if there is a surviving spouse, as I understand it. But let's verify this. What is the section?

MR. QUINN: 16-2701.

THE COURT: Well, the second paragraph reads as follows: "The damages shall be assessed with reference to the injury resulting from the act, neglect or default causing death, to the spouse and the next of kin of the deceased person and shall include reasonable expense of last ills and burial. Where there is a surviving spouse the jury shall[140] allocate the portion of its verdict payable to the spouse and next of kin respectively according to the finding of damage to the spouse and next of kin." I don't think there is any provision for the jury allocating its verdict in a death case if there is no surviving spouse.

MR. QUINN: Your Honor, wouldn't it follow that each of these sons are entitled to recover what they claim they lost, assuming that—

THE COURT: I am not going to submit it that way because my view of the law is that they may bring in a verdict for a lump sum. In case of a surviving spouse, that is different. Now you haven't yet answered the Court's question. You talked about something else. The Court suggested that as a practical matter and as a matter of common sense it wuld be sensible to instruct the jury to bring in a single verdict instead of confusing them by asking them to bring in a separate verdict on each of the causes of action. I am inclined to take that course in view of the fact that the beneficiaries are the same under both causes of action. That is why I asked Mr. Boynton whether the deceased left a will and, if so, who the beneficiaries were, because if [141] under her will some other persons than her two sons were beneficiaries there would be a difference in the persons who would benefit by the two causes of action. But since the next of kin and the beneficiaries under her will are the same persons, I don't think that it makes any difference.

MR. QUINN: Your Honor, my point is that if the jury awards damages as to count 2 of the amended complaint, which is with reference to the survival statute, I think I am entitled to know how much they are awarding with reference to that particular count, and then the question being as to

whether or not—assume they return an aggregate verdict—

THE COURT: Just a moment. What is the answer to the Court's question?

MR. QUINN: My answer is I cannot agree.

THE COURT: Very well. That is all I want to know. You don't have to explain the reason for your answer. I feel that I am in duty bound to submit each cause of action separately to the jury, at the risk of confusing it, unless both counsel agree otherwise. Now, then, as to your No. 5, Mr. Boynton, this is proper in substance, I will cover that in substance. I am going to deny Defendant's No. 1. I think both of you gentlemen perhaps overlook one feature in the trial. It [142] makes no difference whether the driver of the fire truck was or was not negligent because there may be two concurring causes, two concurring proximate causes. I am going to instruct the jury that the only thing for them to determine is whether the driver of the automobile was negligent and whether her negligence was the proximate cause or one of the proximate causes of the accident. So that it is immaterial whether the driver of the fire truck was negligent also. I think you have overlooked that point, Mr. Quinn, and I don't think Mr. Boynton emphasized it.

MR. QUINN: Your Honor, may I inquire, I am aware of the fact that the negligence of the fire truck operator is not important in this case to the extent he is not a party in this case, but his negligence is part and parcel of my defense to this action.

THE COURT: Well, I will instruct the jury that it is immaterial whether he was negligent. That is what you don't seem to understand. Suppose two people are negligent. We often have a collision of two motor vehicles where both drivers are negligent. Either driver is liable for the entire damages and the injured party has a right to sue both or either on that [143] party's choice.

MR. QUINN: Your Honor, the defense in this case is that the cause of the accident was the operation not of Mrs. Hoover's vehicle but the manner in which the fire truck

entered the intersection. Now the Court has advised the jury during the course of the trial that the Fire Department truck—

THE COURT: Just a moment. I am not going to argue with counsel and I don't permit counsel to argue with the Court. You have presented your point of view. I am going to instruct the jury that the only question for them to consider is whether the driver of the automobile was negligent and, if so, whether her negligence was either the proximate cause or one of the proximate causes of the accident. Now, of course, if she wasn't guilty of any negligence, then the verdict should be for the defendant. You are overlooking the possibility, in fact not only possibility but the thing that very frequently occurs, concurring negligence of two or more individuals. So I am going to overrule No. 1. I am going to cover your request No. 2, just as I have said to Mr. Boynton, in my own way. I think that under the circumstances, gentlemen, in order to simplify matters for the jury I will submit written [144] questions to the jury, three questions. One is whether the driver of the automobile was negligent and, if so, whether her negligence was or was not a proximate cause or one of the proximate causes of the accident. If they answer no, that ends the matter. If they answer yes, then my next question will be that they fix the amount to be awarded, amount of damages to be awarded for the death of Margaret Marsh; and the third question would be to fix the amount of damages, if any, for the disability that she sustained. Of course Hudson against Lazarus governs the measure of damages there. Are there any suggestions as to that?

MR. BOYNTON: That is agreeable with me, Your Honor.

MR. QUINN: As I understand, there will be the question—the second one is as to count 2 of the complaint, as to the survival statute.

THE COURT: I think that will make it easier for the jury than to ask them to return two general verdicts. Now is there anything else before we bring in the jury?

MR. QUINN: Your Honor, if I may, I would like at

this time to make on behalf of the defendant, I have three motions that I would like to make.

THE COURT: Very well. [145]

MR. QUINN: First of all, I would like to move as to—

THE COURT: Have you rested?

MR. QUINN: No. Counsel has rested and this is at the close of his case, at the close of the plaintiff's case. I am moving for a directed verdict on behalf of the defendant as to the issue, specifically, of liability, on the grounds that I do not believe there has been any proof of negligence as to the decedent Margaret V. Hoover.

THE COURT: Motion denied.

MR. QUINN: I would make a second motion, Your Honor, with reference to count 2 of the complaint, which is under the survival statute, on the grounds that as a matter of law this count is——the plaintiff is not entitled to recover and, secondly, the evidence presented is insufficient as a matter of law.

THE COURT: What is your first ground?

MR. QUINN: My first ground is that under Hudson v. Lazarus it requires proof of disability, and my position is that there has been no disability shown, and I rely specifically on Coleman v. Moore where the decedent died in one hour and this Court, Your Honor, specifically stated that the decedent or the estate was only to recover one dollar in nominal damages. [146]

THE COURT: Motion denied.

MR. QUINN: Your Honor, the third motion I make, I make with a great deal of constraint. After considering this case over the weekend I am concerned with the trial of this case and the things that have happened from the standpoint that I feel that during the course of this trial I have made objections and the Court has suggested to the jury that these objections were not meaningful, were without any merit whatsoever. The Court has further indicated to me in one examination of one witness where in the course of cross-examination I, in effect, misquoted this witness. The Court reprimanded me for this.

THE COURT: Yes, you shouldn't misquote a witness.

MR. QUINN: And I would like to state that in all the time I have practiced law I have never deliberately misquoted anybody.

THE COURT: You may not have done it deliberately. I didn't suggest you did it deliberately. But great care and circumspection must be taken by lawyers not to be careless in quoting a witness.

MR. QUINN: Your Honor, I would say that—

THE COURT: Well, what is your motion?

MR. QUINN: My motion is for a mistrial and—

[147] THE COURT: Motion denied. Bring in the jury. Each side has 25 minutes. Of course there is no rule of law requiring counsel to exhaust their maximum time.

[The jury resumed the jury box]

THE COURT: You may proceed, Mr. Boynton. Did you wish to address the Court?

MR. BOYNTON: The plaintiff has rested, Your Honor.

THE COURT: I beg your pardon. I forgot that you had rested. I'm sorry.

MR. QUINN: The defense will call Wayne Fox, Your Honor.

WAYNE T. FOX

called as a witness by Defendant, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. QUINN:

Q. Will you please state your full name? A. Wayne T. Fox.

Q. Where do you live, Wayne? A. 5926 Fourth Street, Northwest.

Q. How old are you now? A. 15.

Q. Where do you go to school at present? [148] A. Ray Bow Junior High School.

Q. Wayne, on November 19th, 1963, could you tell the Court and the jury where you were going to school then? A. I was going to Whittier Elementary School.

Q. And where is Whittier Elementary School? A. On Fifth and Sheridan Street, Northwest.

Q. Turning your attention to approximately 3 o'clock on the afternoon of November 19th, 1963, did you have occasion to be in the area of Third and Sheridan Streets, Northwest? A. Yes, I was. I was on duty. I was a traffic patrol boy.

Q. Wayne, what time did you leave school? A. About 5 minutes before 3.

Q. And after leaving school could you tell how you proceeded to the intersection of Third and Sheridan Street? A. I went straight down Sheridan Street, down to Third.

Q. And where were you standing? A. On the corner of Third and Sheridan, by a trash can.

THE COURT: You stood on what corner?

THE WITNESS: Third and Sheridan.

THE COURT: But which corner? There are four corners.

THE WITNESS: It was on the west corner, on the [149] right side.

BY MR. QUINN:

Q. Wayne, I would show you a picture that has been introduced into evidence in this case and ask you if you can identify that picture? A. Yes, that is a picture of Third Street.

Q. And I wonder if you could indicate on that picture, by any land mark or anything, where you were standing? A. Right here by this trash can.

MR. QUINN: Your Honor, the witness has identified the trash can that he was standing by as on the southwest corner of Third and Sheridan.

THE COURT: Very well.

Q. While you were standing there, Wayne, did anything unusual happen? A. I just heard three fire trucks coming down Sheridan Street and two fire trucks had gone up North Dakota Avenue and the last one hit this old Dodge.

Q. As to the two fire trucks that had already crossed Third Street, where did they go after crossing Third Street?

A. Up North Dakota.

Q. After observing those two did you then see a third fire engine? [150] A. After the two went past I looked back and I saw the third fire truck a few feet up Third Street, about 30 feet——a few feet up Sheridan Street.

Q. Could you tell me, with reference to the southwest corner of Sheridan Street there is, I believe, as shown in that picture, there is a block of stores located in this area, is that correct? A. Yes.

Q. Could you identify, was there any specific place that this third fire truck was at when you noticed it? A. It was at an alley back up on Sheridan Street.

THE COURT: How many fire trucks did you see altogether?

THE WITNESS: I saw three fire trucks.

THE COURT: Three fire trucks?

THE WITNESS: Yes.

BY MR. QUINN:

Q. Again with reference to the third truck, when you noticed it, it was at the alley by the end of the stores, is that correct? A. That is right.

Q. And how far was that from the corner? A. Maybe about 35, 40 feet. [151]

Q. When you observed it——did you continue to observe it after seeing it for the first time? A. Yes, I kept looking at it until it got before Third Street and then I looked up Third Street and I saw the Dodge coming.

Q. When you first saw it were you able to—strike the question, please. Wayne, how old were you when this accident happened? A. I was about 13, 12 or 13 years old.

Q. And when you observed the fire truck, the third fire truck, for the first time, were you able to estimate or give us any indication as to the speed of this vehicle? A. No, but I could tell you it was going pretty fast.

Q. And as you continued to watch it what did it do? A. Well, before it got to the corner it broke a little bit.

Q. What do you mean when you say it broke a little bit? A. It seemed like it tried to stop a little bit.

Q. And then what did it do? A. It accelerated.

Q. And then did you actually see the fire truck hit the Dodge? A. Yes. [152]

Q. And were you standing right there on the corner when this happened? A. Yes.

Q. And what did you see or what did you experience then? A. Well, when they hit it seemed like something jumped inside of me.

Q. And do you recall where the passengers——the Dodge went after it was hit? A. It went on the corner of North Dakota and Third Street.

Q. After the accident happened, the two vehicles had collided and they had come to rest, what did you do? A. Well, I stood on the corner to let all the children by while some of the men came out of the stores looking at the fire truck.

Q. Do you recall, Wayne, in the area of where this accident happened——and I believe you indicated you were standing at this position right here in the southwest corner——do you recall whether there were any cars parked in the area and, if so, where, if you can remember? A. Well, it was one by the bus stop further up Third Street. [153]

Q. Which side of Third Street would that be on? A. It would be on the right side——on the west side.

Q. Can you come down and indicate to us, please, where that car was parked? [The witness approached the blackboard.] A. There was one parked right here. I think it was a Pontiac. Then there was another truck, pick-up truck parked right here. There was a Cadillac parked right here. [The witness resumed the stand]

MR. QUINN: That is all I have, Your Honor.

THE COURT: Any cross-examination?

CROSS-EXAMINATION

BY MR. BOYNTON:

Q. Wayne, when was your fifteenth birthday? A. July 21st last year.

Q. So you will be 16 this coming July? A. That is right.

Q. You testified that you did see the Dodge coming down the street? A. Yes.

Q. Did you see it make any attempt to stop or swerve? A. No.

Q. Did it continue at the same speed into the intersection? [154] A. Yes.

MR. BOYNTON: I have no further questions, Your Honor.

MR. QUINN: I have nothing further and I ask that this witness be excused.

THE COURT: You may step down.

MR. QUINN: Your Honor, may I inquire of the Court, this witness has been taken out of school. I want to know if I can get an indication that he was in court this morning to present to his school when he goes back, a witness attendance slip, if we may.

THE COURT: I can't do that. You will have to take it up with the Clerk. I can see a good reason for it but I think the Clerk can handle it for you, not myself. Anything further?

MR. QUINN: Yes, Your Honor. I would like to read two questions from the deposition of Mr. Richard Marsh, the plaintiff, if I may. Before doing this may I approach the bench, Your Honor?

THE COURT: Yes, indeed.

[AT THE BENCH]

MR. QUINN: I would like to read from page 16— [155]

THE COURT: You have a right to read anything, you don't have to get permission of the Court. I mean so far as this deposition is concerned.

MR. QUINN: And also the deposition of William Marsh.

THE COURT: Yes, you have a right to read any part of them. Just indicate what you are reading so that the Court can follow you and so that the Reporter can follow it.

MR. QUINN: Thank you.

MR. QUINN: Your Honor, at this time I would like to read from the deposition which was taken on January 21st, 1965, initially reading from the deposition of Richard W. Marsh on page 5 of this deposition:

"Question: Could you very briefly tell us the nature of these gifts and when they might be given to you, if regularly, during the year?

"Answer: Yes. She was in the habit of giving us monetary gifts at Easter. This is for my wife, myself and my family. It was for Easter, a wedding anniversary, Christmas, my birthday, the boy's birthday, my wife's birthday. It was all the usual holiday occasions.

"Do you have any special gifts in mind?

"When my boy was born, she and my father gave us $500, a contribution like that, for example, to help out with the expenses when he was born, and what have you.

"Question: In other words, during the year at various birthdays or anniversaries, she would generally give something to you or to some member of your family?

"Answer: Actually, she never forgot anybody at any occasion. She did not miss any of them.

"Question: These gifts would usually be in the form of money, is that correct?

"Answer: That is right. It was almost never otherwise. But she would bring some gifts, like socks, ties, or something. But the gifts would be mostly money, monetary.

"Question: What would they total in a year, do you have any idea?

"Answer: I would have to stop to calculate that, to get some idea.

"Question: Would she give you money for Christmas?

"Answer: Yes. For example, 3 years ago, on my fortieth birthday, we had a driveway there and she [157] gave me $200 for Christmas and my birthday to purchase a snow blower, for example.

"The gifts she gave on all these occasions I mentioned

would run anywhere from $5 to $20. Occasionally, there were larger gifts. But more likely the gifts ran, like on Valentine's Day, she sent the boy $5.

"Oh, she always insisted on paying the AAA membership for myself and my wife. You see, my birthday comes close to Christmas. My birthday is December 21st. She normally would give me a pretty good sized gift.

"She felt I would get more from it than if she could pick something out. She didn't always know what I wanted. That is, since we did not live together.

"If I had to give you a guess, to the best of my honest knowledge, the gifts would not have amounted to, it was less than $200. But as I said, 3 years ago, one gift was $200 alone, plus whatever she gave during that year."

I would also like to read, with the Court's permission, from page 16 of the same deposition, which is the deposi- [158] tion of William J. Marsh. The question was asked on page 16:

"Question: These gifts that your mother would make to you and your family, would they usually be cash gifts?

"Answer: Yes.

"Question: Would she make those by check?

"Answer: Usually. And she usually would have me write the check. One reason is, she felt that I did not have as good a retirmeent as my brother did, because the Government has a much better retirement plan. And part of this was to pay the premiums on a retirement policy which I have. Sometimes she would pay it all and sometimes she would pay part of the premiums."

Your Honor, as my final witness I would like to call Mr. Dunn, if I may.

THE COURT: May I ask counsel to come to the bench

[AT THE BENCH]

THE COURT: Of course you have a right to call any witnesses you choose and I am not going to curtail that, naturally, but you did inform the Court that you only had the boy as a witness. Have you changed your mind?

MR. QUINN: Yes, on reflection during the weekend, [159] Your Honor.

THE COURT: Very well.
[IN OPEN COURT]

ROBERT L. DUNN

Defendant, called as a witness, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. QUINN:

Q. Please state your full name to the Court. A. Robert Louis Dunn.

Q. And where do you live, Mr. Dunn? A. 12823 Lacey Drive, Silver Spring.

Q. Mr. Dunn, are you the executor of the estate of Ruth E. Hoover? A. I am.

Q. What was your relationship to Ruth E. Hoover? A. I am her son-in-law.

Q. Mr. Dunn, prior to this accident, which was November 19th, 1963, do you recall the last time you had seen Mrs. Hoover? A. I saw her the previous Sunday.

Q. I wonder if you could describe her health as you saw it at that time? [160] A. Very excellent.

MR. BOYNTON: Your Honor, I would object to this line of testimony on the ground that it is completely irrelevant to the issues before the Court as to the negligence of the driver, concerning her health.

THE COURT; Whose health did you inquire about?

MR. QUINN: Mrs. Hoover, who was the operator of the Dodge vehicle.

THE COURT: I think that is very relevant.

BY MR. QUINN:

Q. Now, Mr. Dunn, did you know Mrs. Marsh? A. I did.

Q. Do you know whether or not your mother-in-law and Mrs. Marsh were friendly? A. Very much so.

Q. And I wonder if you know anything about the number of times or whether or not they often traveled together in an automobile? A. I –

THE COURT: I think you ought to ask a specific question, Mr. Quinn.

Q. I would ask, specifically, Mr. Dunn, do you know of your own knowledge whether Mrs. Marsh and your mother-in-law often [161] went out driving together? A. Frequently.

THE COURT: Just a moment.

MR. BOYNTON: Your Honor, I object to this line of questioning.

THE COURT: I don't see the relevancy of that. I am inclined to sustain the objection. If you wish to explain to the Court why you consider it relevant you may come to the bench.

(AT THE BENCH:)

THE COURT: I don't see that the friendliness or unfriendliness of relations between the two families is of any importance.

MR. QUINN: My question was as to the number of times or the frequency that they rode together, and I think the plaintiffs in this case have accused this woman of reckless driving. I think the fact that Mrs. Marsh often rode with Mrs. Hoover has a definite bearing –

THE COURT: Just a moment. Would you mind being succint and tell me how it is relevant to show how many times the two ladies drove together?

MR. QUINN: To show that often Mrs. Marsh rode with Mrs. Hoover, which will indicate –

[162]

THE COURT: I know what you are trying to show. Will you tell me how it is relevant.

MR. QUINN: To indicate that her acceptance of Mrs. Hoover as a good driver and that she, in effect, vouched for –

THE COURT: No, I am going to sustain the objection. It isn't admissible to show that a driver charged with negligence was generally a good driver and also that he was accepted by his passenger. I am going to sustain the objection.

[IN OPEN COURT:]

MR. QUINN: I have no further questions of Mr. Dunn.

MR. BOYNTON: I have no questions.

THE COURT: You may step down.

MR. QUINN: Your Honor, the defense at this time requests the Court's permission to read certain traffic regulations to the jury.

THE COURT: You mean you want to offer them in evidence.

MR. QUINN: Yes, Your Honor.

THE COURT: Yes, indeed. I think you better come to the bench, then.

[AT THE BENCH:]

MR. QUINN: Your Honor, Regulation 6, with reference to authorized emergency vehicles, 6(b) parts 2 and 3. [163]

THE COURT: Yes, I think that is proper.

MR. QUINN: I also think that (d) is proper, too, as a part of this regulation, but I don't think this last sentence applies to this case.

THE COURT: You mean the first clause down to the comma?

MR. QUINN: Yes, down to the comma.

THE COURT: Very well. I think they are both admissible.

MR. QUINN: I would also offer 50(b).

THE COURT: Very well. I think that is admissible.

Mr. QUINN: May I read these to the jury, Your Honor?

THE COURT: Yes, of course.

MR. QUINN: Your Honor, for clarity I think I better read (a) first and then go into (b), when I read Section 6.

THE COURT: I think (a) is really part of (b).

MR. QUINN: Yes.

THE COURT: I will admit both (a) and (b).

MR. QUINN: May I read these now?

THE COURT: Yes, indeed.

[IN OPEN COURT:]

MR. QUINN: With the Court's permission I will now [164] read certain portions of the traffic regulations.

Section 6(a) states, with reference to authorized emergency vehicle:

"The driver of an authorized emergency vehicle, when responding to an emergency call or when in the pursuit of an actual or suspected violator of the law or when responding to but not upon returning from a fire alarm, may exercise the privileges set forth in this section, but subject to the conditions herein contained."

Section (b) reads:

"The driver of an authorized emergency vehicle may proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation."

Further, the driver of an authorized emergency vehicle may exceed the prima facie speed limits so long as he does not endanger life or property, except that this provision does not apply to ambulances.

Section (d) of this regulation states:

"The foregoing provisions shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the [165] safety of all persons."

The next regulation is Section 50, part (b), which states:

"This section shall not operate to relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons using the highway."

That concludes the defendant's case, Your Honor.

THE COURT: Does the defense rest?

MR. QUINN: Yes, Your Honor.

THE COURT: Any rebuttal?

MR. BOYNTON: No, Your Honor.

THE COURT: You may proceed with your summing up.

MR. QUINN: Your Honor, before counsel – May I renew the motions that I made at the close of the plaintiff's case?

THE COURT: Yes, and the same ruling.

MR. QUINN: Thank you, Your Honor.

PLAINTIFF'S CLOSING ARGUMENT

MR. BOYNTON: May it please the Court, may it please you ladies and gentlemen of the jury:

We have now come to the end of this case. It is time for you shortly, after a charge from His Honor, to retire [166] and consider the facts and circumstances surrounding this case.

The facts of this case are basically very simple. You have heard them and you have heard the testimony.

We contend that Mrs. Ruth E. Hoover negligently and carelessly drove in the path of an emergency vehicle that had the right of way, that gave her due notice or should have given her due notice that it was responding to an emergency call.

Unfortunately, Mrs. Hoover and Mrs. Marsh are not with with us. We don't know why she proceeded into that intersection. But we do know from the testimony of the people that appeared before you and testified here that she did.

The testimony of all the witnesses that saw that automobile all collectively agreed that she did not stop, swerve, slow down or do anything to avoid that collision.

We are concerned here with whether or not her negligence was the proximate cause or one of the proximate causes of that accident, and the testimony has been unanimous that she did not do anything to avoid that accident.

There was testimony from Officer Wiseman that her windows were rolled up, although broken, it indicated that they were rolled up, which might indicate or bring some idea that she did not hear the sirens. We heard testimony from Mr. Stratford, though, that a half a block above Rittenhouse Street [167] his windows were also rolled up but he heard the sirens and subsequently rolled his window down.

We have heard from Officer Wiseman that there was an attempt to avoid that accident by Mr. Walsh, the driver of the fire engine, indicated by skid marks.

Mr. Walsh testified that he came down that hill, he was familiar with that intersection, and that he slowed to 15 to 20 miles per hour but that the car came into the in-

tersection so rapidly although he attempted to avoid the accident it was impossible to do so.

It is our contention, ladies and gentlemen, and we believe that the evidence has conclusively showed that this accident was caused by the negligence of Mrs. Hoover in driving her automobile and in violation of the regulations that were in effect here in the District of Columbia giving authorized vehicles the right of way.

We feel that the evidence has further showed, over and above that regulation, that there were in fact compliance with the notice of those emergency vehicles. The dome lights of the fire engines were on, the sirens were operating, and certainly if she could not have heard she should have seen, because one engine preceded the engine here in question, preceded him through the intersection by a half a block. [168]

But apparently we don't know what happened. Maybe she didn't see it. But if she did, it should have given her notice that there may have been another fire engine and she should have complied with the regulation in pulling over and stopping to see that there would be no further problem of safety for herself and her passenger.

Now as to damages in this case, His Honor will charge you that we are pursuing two actions here. One for wrongful death, which permits damages to the next of kin.

We have showed by the evidence and the testimony of the two sons, William J. Marsh, who sits here at counsel table, and Richard W. Marsh, the other son of Mrs. Marsh, that they received certain contributions by way of gifts from their mother. She had a modest income, between six and seven thousand dollars. However, both of her sons received pecuniary benefit from her. We have introduced into evidence as Plaintiff's Exhibits 2, 3 and 4 certain checks that definitely showed these gifts by way of testimony. They were for dues for certain AAA clubs that the two boys belonged to, there were also payment of premiums on life insurance for Mr. Marsh, there was also ownership in stock that when she had the opportunity to exercise options she gave certain amounts to her sons.

In addition to that we have heard from [169] both of the boys of certain cash amounts that they received from their mother for holidays, for gifts to the children to buy clothes, anniversaries, things of that nature. These amounted for William Marsh to approximately $750 per year, in addition to the checks that were introduced into evidence. As he had power of attorney for his mother he was very familiar with her affairs and these checks are conclusive evidence as to certain amounts.

As to Richard Marsh, the other son, he also received stock benefits from his mother. He also received cash amounts. In 1961 the checks showed that he received a snow blower in the amount of $195 for a Christmas present. As Mr. Quinn read the deposition, this was a conbination Christmas and birthday present. He also received a half ownership in certain PEPCO stock options that was authorized in the amount of $78. He also received a half ownership in American Tel. and Tel. stock for $215. In addition to that he also testified that he received certain cash amounts through the year for birthdays and also because his mother lived some distance from his home, she also contributed to certain gasoline costs when he came in to pick her up and bring her back.

These amounts the evidence has shown amounted for [170] William J. Marsh in the neighborhood of $1500 per year. For Richard Marsh it was somewhat less, in the neighborhood of $250 to $300 a year.

Now we have set a pattern from 1961, 1962, and she died in the eleventh month of 1963, that these contributions were consistent.

How long would they have continued? Mrs. Marsh was 68 years old at the time of her death. You have heard her treating physician testify to the fact that she was a robust, active, healthy woman. She did have leukemia and he testified that she had been under treatment for that leukemia since 1957 and she responded well to treatment and that she was in good health. He testified that he did not know exactly how long she might live but if he had to pin it down, and the way he phrased it was, a woman in a similar situa-

tion in a similar age bracket might be five to seven years. That is a gauge for you.

Also, however, there has been introduced into evidence the Health, Education and Welfare tables that a woman 68 years in 1963 had a life expectancy of 13.9 years. Again this is not conclusive but it is a guideline to her life expectancy. We don't know exactly what it would be, but you in your collective judgment will decide, again in line with the [171] damages on the pattern that had been set in the past and what the damages should be in this case.

We are also pursuing in this action a survival action in which recovery will be allowed for the disability this woman would have suffered had she lived.

The testimony from the treating physician, Dr. Hunter, is that from her injuries, which were fractured ribs, a lacerated lung, fractured pelvis, lacerated scalp, and multiple contusions and so forth, would have been from three to six months. That disability for these injuries would have lasted that amount. Again the damages for that are within your judgment.

You will retire to the jury room and consider this case and we truly believe that when you consider the evidence, the negligence of Mrs. Hoover, and consider the damages that have been proved in this case, you will in fact bring back a verdict for the plaintiffs.

Thank you very much.

THE COURT: Mr. Quinn.

DEFENDANT'S CLOSING ARGUMENT

MR. QUINN: May it please the Court, ladies and gentlemen of the jury:

At this time it is the duty of defense counsel to [172] bring before you the facts and thoughts that he believes have been presented in support of his case, in the defense of this case.

I want you to know, ladies and gentlemen of the jury, that whatever I say to you is not evidence but is only said to you in the position of one being an advocate for the defense in this case, which happens to be Mr. Dunn as execu-

tor of Mrs. Hoover's estate. If my recollection or my statement of any facts is different from yours, then I want you to know that yours controls because you have to consider the position that the particular lawyer has in bringing forth his case to you as I make this statement.

And I also want you to know that during the course of this trial whatever might have happened from the standpoint of if I said something that might have been contrary to one of the witnesses it was not done with any intent to distort or in any way to bring something else that wasn't there before you.

You know, ladies and gentlemen of the jury, I feel that this is a case which is an important case from the standpoint of a consideration of the traffic regulations and the traffic problem that is particularly involved in this case. We, first of all, know that in a city such as ours, where there is a tremendous movement of traffic, we have to have streets [173] upon which vehicles can move and they have to move in order to keep the traffic moving. Therefore, we have, in effect, through streets and then we have streets that have stop signs and, in effect, have limited access or ones that you have to do something with when you come to an intersection, a particular intersection.

The reason for this has to, of course, as you know, be to move traffic and facilitate it, and the person who is proceeding on that particular street knows that as he proceeds, as he or she proceeds down that street that, in effect, she can continue to proceed.

But then contravening this we have the question of the emergency vehicle and the fact that, in effect, time is important and that they have to be able to travel faster, they cannot stop for each and every stop sign and therefore it is necessary to implement or it was necessary to implement certain rules by which the emergency vehicles, or under which they could operate.

Now what were these rules? They have been introduced into evidence and they, in effect, state that under certain circumstances a driver of an emergency vehicle, which is

what we have involved here, can proceed through a stop sign. When can the driver proceed through a stop sign? The driver [174] can proceed through a stop sign, it says, only after slowing down as may be necessary for safe operation.

Then the second point is they can exceed the speed limit, which in this case is indicated as 25 miles an hour. When can they exceed the speed limit? They can exceed it so long as it does not endanger life or property.

And it further indicates in these regulations, as they have been read, that it doesn't relieve the driver from the duty to drive with due regard for the safety of all persons.

Now what is the significance in this case of these regulations and as to the particular facts as we know them in this case? I would think, or I would submit to you that, first of all, the intersection itself is important in this case. The intersection in the pictures introduced indicates an intersection which on one corner, where there at that time was an American TV Service Store and the trash can that Wayne Fox was near when he saw this accident, and that is, in effect, the direction in which the fire truck operator was proceeding when this accident happened.

Mrs. Hoover was, in effect, driving right at this picture, driving down Third Street.

Now when you consider this intersection I would then ask you, if I may, to consider the testimony of Mr. Walsh [175] as to what he did when he proceeded, was proceeding towards this intersection.

We know that there is a block of stores located on the southwest corner of Sheridan Street. We know that this block extends back into this area and there is an alley back here. We know that there is a playground over here and we know that there are schools at the top of the hill. And we know that at the time this accident happened there was a parked car in this area here, which is approximately 85 feet back from the intersection.

This picture here would clearly depict, in effect, the growth, the forsythia bushes and the playground that is existent here as Mrs. Hoover came along.

I would just ask you or note to you that this picture, as noted, was taken on December 17, 1963, which was a month after the accident, during which time I would assume that a lot of the foliage had left the area, and therefore the forsythia bushes, which even Mr. Walsh described as preventing or indicating a cause why he could not see the traffic proceeding on Third Street.

There are two other factors that I think are important in this case. One is the location of that parked vehicle, which is approximately 85 feet from the corner of this [176] accident. I think the other significant fact is the location of the parked vehicles, where they were when this accident happened. There was a parked vehicle in this area here. Wayne Fox testified to a panel truck. There were parked vehicles in this area here, and I believe the officer indicated there were parked vehicles on this side of Sheridan Street.

Ladies and gentlemen of the jury, when you consider these facts, you might say the particulars of the intersection when the accident happened, then I would ask you to superimpose upon that the facts as we know them.

Mr. Walsh said that he was traveling approximately, I believe he said he was going 25 miles an hour as he was coming down the hill, that he slowed to 15 to 20 miles an hour, and that was his speed when he entered the intersection. He indicated in testimony at the prior hearing of the case — excuse me, that is wrong. The officer indicated in his testimony that when he talked to Mr. Walsh after the accident had happened that he told him he was going 25 to 30 miles an hour as he was approaching the scene of the accident, and he further said that when the accident happened he was going 25 to 30, and he further said that he didn't notice the Hoover vehicle until he was 10 feet away from it. These were the answers that he gave to the officer at the scene of the [177] accident.

Admittedly, Mr. Walsh indicates to you that when he gave his testimony he had been hurt, he was not clear. But the fact is that, in effect, his speed is supported by one of their own witnesses, Mr. Stratford. Mr. Stratford indicates

that when he saw the fire engine it was going between 30 to 35 miles an hour.

And if you will take a moment, please, with me and look at this particular view of the intersection you will notice that this fire engine would not come into Mr. Stratford's view until it had passed this block of stores because he has indicated that he was some distance, I believe he said the third car from this group of parked cars here. He was in the area of the third car and certainly with the block of stores as is noted here, he could not see this car until it came out from the intersection, and it is that particular time, it is at that time that he noted the speed of 30 to 35 miles an hour of the fire truck.

Now what do we have in addition to that? We have the testimony of Wayne Fox. What did Wayne say? Wayne as you know, was a school patrol boy there. He said when he saw the fire truck, he said it was coming fast, and then he used the term it broke. Then what happened after that? It [178] accelerated. Now, this is a situation where, in effect, as the fire truck operator, according to Wayne, came down here and, in effect, broke his speed and then was actually accelerating into the intersection. Ladies and gentlemen of the jury, there is another factor here that when this vehicle, the fire truck struck the Hoover car it knocked it some 85 feet, you might say smashed it so that it, in effect, turned up North Dakota Avenue and ended up in this position here, changed the direction of that vehicle and knocked it on up North Dakota Avenue a distance of some 85 feet. I submit to you that all this testimony is indicative of the speed at which this fire engine was traveling.

I do not say that a fire engine should never travel 30 to 35 miles an hour. I say this, though, I say that under the regulations it has certain duties and they were not fulfilled here because this vehicle, when you consider and look at the type of intersection——and what is this type of intersection, ladies and gentlemen of the jury? The type of intersection is described by Mr. Walsh, because I can't think of

a better description. He said this is a dangerous intersection. It's a dangerous intersection and in addition to that it's [179] some 57 feet that he has to cross once he gets down to this point here. He has to go 57 feet across this intersection, a dangerous intersection, travel across it at 30 to 35 miles an hour. And when you think, ladies and gentlemen of the jury, that really when you look at it, he can't even see to his right until he gets out into the intersection, he cannot. I don't think that he can see anything until he actually gets beyond the stores. And as a matter of fact, in this picture there is some sort of a panel truck there. Wayne Fox said there was a panel truck there, which would seemingly, to me, further obstruct the vision that this operator would have as he came in.

If we think that this vehicle was going——I submit to you that the speed of 30 to 35 miles an hour I believe has been verified not only by Wayne Fox, from the standpoint of going fast, but I think it's been verified by their own witnesses and I think it's verified by the admission made at the scene of the accident to the officer by Mr. Walsh.

Now there are certain other factors in this case that might bear consideration. We do not have the benefit of Mrs. Hoover's testimony but here we have an indication—— there certainly is no indication in any way that the car was speeding. As a matter of fact, Mr. Walsh, his estimate of speed as to this vehicle would have to be formed within almost a split [180] second, and to look at a vehicle at an instant and know how fast it was coming is pretty difficult. But, in effect, Mr. Walsh ways, and even Wayne Fox said that the vehicle didn't appear to do anything.

Well, I do not believe that law suits are decided on mathmatical formulas but I think that there is a little bit of mathmatics involved here which could be of some importance and I will submit it to you for your consideration. A vehicle that is traveling a mile an hour goes 5,280 feet and that vehicle in a minute will go 88 feet per second. I divided these out last night and I think my division is correct. Then

how far does it go in a second? In a second it goes 1.46 feet. So that means that when a vehicle is traveling 25 miles an hour it will travel 36.7 feet per second. So that, in effect, means——and when a vehicle is going 30 miles an hour it will go 44 feet per second. When a vehicle is traveling 35 miles an hour it goes 51.3 feet per second.

THE COURT: I think we will suspend for our usual mid-morning recess at this time and let you finish after the recess.

[The following proceedings were had out of the presence of the jury:]

THE COURT: Before the jury is brought back, gentlemen, I have drafted questions to be sumitted to the jury. I am having them rewritten now because there is a mistake, I made a mistake in the name in Question 1. Does either one of you have any comments to make?

MR. QUINN: No, Your Honor.

THE COURT: Very well. You are both satisfied. Very well, you may bring in the jury.

THE COURT: Mr. Quinn, you may proceed.

MR. QUINN: May it please the Court and ladies and gentlemen of the jury:

I believe that I was in the midst of my mathematical calculations and if I may go on from there, I believe the last thing I had told you was that a car traveling 25 miles an hour would travel approximately 36.7 feet per second and that a car going 30 miles an hour would travel 44 feet per second and a car traveling 35 miles an hour would go 51.3 feet per second. Now, in addition to these mathemathical calculations there is a consideration with reference to driving known as [182] reaction time and reaction time comes up, is considered when a person is driving along and suddenly something happens requiring him to apply the brake or take some definitive action. Say it's requiring the brake. Reaction time is described as that time it takes for a person to react and to get his foot from the accelerator back over to the brake pedal. Certainly reaction time can vary, depending upon the individual who is driving. I am sure it's differ-

ent for me as it is for any of you. But, in effect, there is a time element involved where in the operation of the mind, where as a person goes along something has happened and then the mind works and that leg goes off the accelerator and goes over to the brake. This reaction time can be anything from two to three seconds. It might be more. I don't know whether or not it could be less. It's sort of a matter of your own consideration of this.

But in this situation reaction time becomes important as to Mrs. Hoover because as she was driving along that road there comes a time when certainly, I would assume, I think we can assume when it would be necessary for her to take some action. And as you are proceeding and as you note from these pictures here, as she is driving along on Third Street past the park here with the forsythia bushes and the parked cars, there comes a time when she either——when is [183] that time when she hears the fire engine and when she hears it she wonders where is it, what action does she take. And then as she proceeds further along, if she sees this engine what does she do then, because the fact is that there has to be a time, a reaction time for her to get her foot from the accelerator over to the brake. And if she is going, say, 25 miles an hour, and I think we can presume that she is obeying the law, that if she is traveling 25 miles an hour, in just two seconds, a little more than two seconds she would travel this distance from the parked car up to the point of this intersection, which is something like 85 feet according to the officer's testimony.

The fact is that once this happens she is required to do something, and then the question becomes, as she is out there, whendid she hear it and when did she see it and what could she do.

I submit that it isn't of that great significance the fact that there was no motion or diminution of motion seen as far as her car because she stands in a position where suddenly she is put in a position where she has to do something, but she only can react as fast as the mind will let her and then in accordance with how fast her foot can move.

And in addition to that, the regulation again that [184] we have with reference to emergency vehicles, and as far as Mrs. Hoover is concerned——

THE COURT: Permit me to remind you you have five minutes more.

MR. QUINN: Thank you, Your Honor.

The regulation doesn't say she stops in the middle of the road, the regulation says shall yield the right of way and immediately drive to a position parallel to and as close as possible to the righthand edge or curb of the roadway, clear of any intersection, and shall stop and remain in such position until the emergency vehicle has passed.

So, in effect, when she got into this position what does she do then, when you consider her possible proximity to the intersection and the fact that she is to stop right there? As a matter of fact, the regulation puts a burden on her to get away from the intersection; not only to get away from the intersection but to get to the righthand edge of the roadway.

Ladies and gentlemen of the jury, I submit to you that in this case the cause of this accident was the manner in which the fire truck was operating. I don't think it was consistent with the regulations that we have brought before you and, as a matter of fact, when you consider the 30 to 35 [185] miles an hour and you consider how fast it would be traveling, anywhere from 40 to 50 feet per second, it is moving and it is moving fast into that intersection.

Ladies and gentlemen of the jury, briefly, if I might comment on the question of damages in this case, the question of damages becomes a question here as to what is the loss sustained.

Now as to the question of life expectancy, plaintiffs have produced an eminent pathologist, who has testified that as far as his best estimate could be, the life expectancy involved here is a period of five to seven years. I submit that that is testimony, important testimony for your determination as to the life expectancy in consideration of any measure of damages. I think it is important and I think it is, in ef-

fect, a doctor who knew this woman and knew her particular circumstances, and this was his estimate and I think it is the strongest and best evidence we can have.

As to the question of the amount of loss for each one of these sons, certainly that is for your consideration based on the evidence that you have. The estimates have ranged anywhere from $500 to $1500. The fact is that when you consider the testimony of Mr. Marsh it would indicate that during the years 1961 it was approximately $500, in 1962 [186] approximately $1,000, 1963 something like $858. In the last two years there was an item of tuition for his daughter to attend kindergarten.

Mr. William Marsh had indicated that the item of damages as far as he was concerned did not exceed $200 in any one year. I think it is important to consider the testimony of Mr. William Marsh. In his deposition he indicated whenever a gift was made it was usually by check because he, as the keeper of his mother's books, he was the one that would note this and keep it in order.

These thoughts are for your consideration as to the actual amount of loss that has been shown to your satisfaction is the actual amount and for whatever period of time during the life expectancy of Mrs. Marsh they could, in effect, expect to receive the gifts and contributions.

As to the question of the estate itself, the Court will instruct you it is entitled to recover for whatever disability existed and I think that would exist for a period of three to six months.

Ladies and gentlemen, in conclusion, I submit to you on behalf of the defense that in this case the question is what negligence caused this accident, and I submit to you that the negligence that caused the accident was the manner in which [187] this fire truck was operated into this intersection, and I ask you to consider, consider the speed as noted by these witnesses and consider this item of the reaction time and the distance. Suddenly the woman comes to a point where she has to do something. What can she do when she

drives along this street, and you consider the pictures and the location of traffic and whatever else was going on there, what can she do. And whether or not this driver has really in effect, the driver of the fire truck, has complied with the emergency regulations as they have been noted to you.

I submit to you on behalf of the defense, ladies and gentlemen of the jury, that not only as to these items but even as to the items as to where the accident happened, from the officer's measurements, which would indicate that that vehicle was pretty closely in the center of the road as it came down Sheridan Street, that based on these points the negligence here that caused this accident was the manner of the operation of this fire truck.

Certainly in the ultimate it is for you to decide, ladies and gentlemen of the jury, and in behalf of the defense I can only thank you for the attention you have given me during this trial.

Thank you. [188]

THE COURT: Mr. Boynton, you may take a few minutes for rebuttal.

MR. BOYNTON: Thank you, Your Honor.

PLAINTIFF'S REBUTTAL ARGUMENT

MR. BOYNTON: Ladies and gentlemen:

You have just heard the defendant's position, their defense to this case, that it was the negligence of the fire engine driver that caused this accident.

I hasten to add that the negligence of Mrs. Hoover may have contributed or may have been the proximate cause of this accident and I believe the facts have demonstrated this.

We have considerable testimony as to speed. Mr. Stratford testified that he thought this fire engine may have been going from 30 to 35 miles an hour. If you recall, on redirect examination I asked him how long he had that fire engine in view and his answer was three seconds.

Mr. Quinn has made a plea to you and mathematical calculations how long it would take Mrs. Hoover to stop the

automobile when she first became aware of its presence, which according to his calculations would have put her right in the intersection. This assumes that she was in fact 80-some-odd feet back from the intersection when she first heard the fire engine. But the testimony is, and it's irrefutable, that [189] there was another fire engine that preceded the fire engine that was involved in the accident, it was a half a block ahead of it and already across that intersection with siren and lights flashing.

I submit that this does not in fact assume the fact that she was some 80-some-odd feet back from the intersection. We don't know where she was, but we do know that she proceeded in that intersection at undiminished speed. And there are no skid marks, evidence that she ever tried to stop.

We have for the defense Wayne Fox, who was 12 or 13 years old at the time of the accident, who is the other witness that testifies as to speed and said he was going real fast. I don't know what probative value that has and of course that will be left up to you, but you recall he said there were three fire engines. He is the only person that has testified that there has been three fire engines, and yet he was able to testify with exhaustive detail as to makes of automobiles and where exactly they were parked, and yet he remembers that there were three fire engines.

Finally, just a word about the damages. As Mr. Quinn said, and rightly so, it is your memory that guides your determination of this case. However, I hasten to point out that the testimony from the witnesses as to what they [190] received from Mrs. Marsh was not in the amounts that Mr. Quinn stated to you. You will have an opportunity to view the exhibits in the jury room, but those exhibits show that in 1961 William Marsh received over $600 and in 1962 over $1,000 and in 1963 about $850. Those are documented amounts as to damages. And yet he was able to testify in addition to that, that he received certain cash amounts of $750, in the neighborhood thereof, and that Mr. Richard Marsh had received certain amounts in stock options that

his mother exercised in his behalf, plus the cash amounts of $200 a year.

So we have not only the cash amounts that he testifies to you but the stock amounts which are represented by the checks that you will see, at least as to the American Tel. and Tel.

That is all I have, ladies and gentlemen, to mention and now it is incumbent upon you to retire and to consider the facts, and you are the sole judges of the facts.

I thank you also for your kind attention and your time during this trial. [191]

JURY CHARGE

THE COURT: Ladies and gentlemen of the jury:

This case arises out of a tragedy, a collision between an automobile and a Fire Department truck in the intersection of Third Street and Sheridan Street on the afternoon of November 19th, 1963.

It is not disputed that the automobile driven by Ruth Hoover, in which Margaret V. Marsh was a passenger, was proceeding down Third Street in a southerly direction, that a fire truck responding to a fire was proceeding easterly on Sheridan Street. A collision took place in the intersection between the two vehicles. As a result both Margaret Marsh the passenger in the automobile, and Ruth Hoover, the driver of the automobile, were killed.

The estate of Margaret V. Marsh is now suing the estate of Ruth Hoover for damages, contending that Ruth Hoover the driver of the automobile, was guilty of negligence which was either the cause or one of the proximate causes of the unfortunate and tragic accident.

It now becomes your function to determine whether the plaintiff, that is, the estate of Margaret V. Marsh, is entitled to recover damages, and if so, in what amount.

[192] You will first determine whether the plaintiff is entitled to recover damages. If you find that the plain-

tiff is not entitled to recover damages, that would end the case and there will be a judgment for the defendant. If you find that the plaintiff is entitled to recover damages, then you will take the next step and determine the amount of damages to be awarded. I shall expand these propositions in some detail later on in my remarks.

So far as the question as to whether the plaintiff is entitled to recover damages is concerned, that reduces itself to one question: was Ruth Hoover, the driver of the automobile, guilty of any negligence that was either the proximate cause or one of the proximate causes of the accident. If she was not guilty of any negligence that was a proximate cause of the accident, then of course there is no liability to pay damages. If she was guilty of some negligence that was the proximate cause of the accident or one of the proximate causes of the accident, then her estate is liable to pay damages.

Now it is immaterial whether or not there was someone else also who was guilty of negligence that was also [193] a proximate cause of the accident. It not infrequently happens that there may be several people guilty of negligence and the negligence of each may be a proximate cause of the accident.

The question for you to determine on that aspect of the case, and the only question, is whether the driver of the automobile, Ruth Hoover, was guilty of negligence that was a proximate cause of the accident. You must concentrate on that issue so far as liability is concerned. Everything else is extraneous and must be laid to one side.

You must reach your conclusion fairly and impartially, calmly and deliberately, without any feeling or emotion, without any sympathy, without any anger, or any other feeling or emotion. You must reach your conclusion solely on the basis of the evidence introduced at this trial.

Each of you ladies and gentlemen of the jury has served in other trials at this term of court. For that reason I shall not give you a detailed explanation of your duties and of mine in relation to yours; you have heard those explana-

tions on other occasions during the past month. I will only summarize them by saying that, as of course you are aware it is my function and my duty to instruct the jury concerning the law that must govern the disposition of the case on trial. [194] You are obligated to take the law from the Court and to follow the Court's instructions as to the law. On the other hand, you ladies and gentlemen of the jury are the final judges of the facts and you must decide the facts yourselves on the basis of the evidence introduced at this trial and then apply the rules of law that I shall summarize for you to the facts as you find them to be.

In addition to instructing the jury as to the law I have another function and a further function to perform, namely, to summarize, discuss and comment on the facts and on the evidence to the extent to which it seems desirable to do so. But that is done only for the purpose of aiding and assisting the jury in arriving at its conclusions on the facts. My summary or discussion or comments on the facts and on the evidence are not binding on you, they are intended only to help you, and you need attach such weight to them only as you deem wise and proper. If your understanding or your recollection or your view of the evidence in any respect differs from mine, then it is your recollection, your understanding and your view of the evidence that must prevail because, let me repeat, the final decision on the facts is within your province. The jury, so to speak, is sovereign [195] when it comes to deciding on the facts. My instructions are binding on you only as concerns the law.

Passing on to a brief summary of some general principles of law that are applicable to this case as well as to other cases, I want to say at the outset that the burden of proof is on the plaintiff to prove the claim on which suit is brought by a fair preponderance of the evidence. The words preponderance of the evidence mean that in order that you may find a verdict in favor of the plaintiff you must be reasonably satisfied that the allegations of the claim are true and correct. This requirement, of course, does not

mean that the plaintiff must produce a greater number of witnesses than the defendant, but merely, as I have just stated, that you must be reasonably satisfied of the truth of the allegations of the claim.

Let me state the same thought in a somewhat different way. Preponderance of the evidence means evidence of greater convincing force. The duty of the jury is to weigh the evidence carefully, as though in a pair of scales, and to find a verdict in favor of the party in whose favor the evidence preponderates, in whose favor the scale goes down. If the evidence is evenly balanced, then the verdict [196] must be in favor of the defendant.

In determining the issues of fact submitted to you you will consider and weigh the testimony of all of the witnesses who have testified at this trial, as well as all the documents that have been introduced in evidence and the circumstances concerning which testimony has been introduced. Circumstances frequently cast an illuminating light on oral testimony, and in this case there are certain circumstances that you may want to consider in connection with weighing the evidence, but that is a matter for your judgment and not mine and for your decision and not mine.

You are the sole judges of the credibility of witnesses. That means that it is for you to decide whether to believe any witness, the extent to which any witness should be credited and the weight that should be attached to the testimony of any witness. Whenever there is a conflict in the testimony it is for the jury to resolve the conflict and determine what the facts are and where the truth lies. If two or more inferences can be reasonably drawn from some item of evidence it is for the jury to determine what inference to draw.

In determining what weight to attach to the [197] testimony of any witness and in determining to what extent to believe the testimony of any witness you have a right to consider any matter that may seem to you to have a bearing on the question. For example, the attitude of the wit-

ness on the witness stand, whether the witness impressed you as a truthful individual, the witness' manner of testifying, whether the witness impressed you as having an accurate memory and recollection, whether the witness had full opportunity to observe the details concerning which the witness has testified, whether the witness had any motive for not telling the truth, whether the witness has any interest in the outcome of this case. All of these matters, as well as any others, you have a right to consider in determining what weight to attach to the testimony of any witness.

If you find that any witness deliberately testified falsely concerning any material fact in respect to which the witness could not reasonably have been mistaken, then you may, if you see fit to do so, disregard the entire testimony of that witness.

Passing on to the specific rules of law that are applicable to this case, you must bear in mind at the outset that the mere fact that an accident has occurred does not of [198] itself create a basis for liability on the part of anyone. The burden is upon the plaintiff to show that by some act or omission the defendant has violated some duty which the defendant owed to the plaintiff and that this act or omission was the proximate cause of the injury of which the plaintiff complains.

To put it somewhat more simply, the burden is on the plaintiff, in this case the estate of Margaret V. Marsh, to show that Ruth Hoover, the deceased driver of the automobile, was guilty of some negligence and that this negligence was a proximate cause of the accident.

Now what is negligence? Negligence consists in doing that which a person of ordinary prudence and care would not do under the circumstances of a particular situation or in omitting to do something that such a person would do under such circumstances. Negligence may also be defined as failure to use due care, such care as would be used under similar circumstances by an ordinary reasonably prudent person.

But it is not enough, of course, to show that the defendant was negligent. It must also be shown that the defendant's negligence was a proximate cause of the accident. The proximate cause of an injury is defined in the law as [199] that cause which in natural and continual sequence, unbroken by any efficient intervening cause, produces the injury and without which the result would not have occurred.

Now I think I can restate this rather complicated legal definition in simple language. A proximate cause of an injury is some act or omission that causes or contributes to cause injury and without which the injury would not have been sustained.

The defendant's negligence need not be the sole proximate cause. Several causes may concur to produce an injury. In that event each cause is a proximate cause of the injury and each person responsible for that proximate cause is liable for the entire damages.

Now let us apply these general principles to the case that is before us.

The driver of any vehicle is under a legal duty to exercise ordinary and reasonable care in the management of the vehicle that he is driving. Failure to exercise ordinary and reasonable care constitutes negligence. Ordinary and reasonable care is such care as would be exercised by a reasonably prudent man under similar circumstances considering the conditions of the road, the weather conditions, and other conditions [200] then prevailing. It is the driver's duty to watch the road and to keep his vehicle reasonably under proper control to meet unforeseen emergencies.

When a Fire Department vehicle is responding to a fire and is sounding its siren and blinking its red lights the law is that it is the duty of the driver of every other vehicle to yield the way to the fire apparatus and to drive as close as possible to the righthand curb, clear of any intersection, and stop and remain in such a position. Failure to do so constitutes a violation of law or regulation and a violation of a regulation may be deemed evidence of negligence that the

jury may consider. The driver of a motor vehicle who fails to comply with this rule may be deemed guilty of negligence and if the negligence of such a driver is the proximate or one of the proximate causes of the accident, the driver of such a vehicle may be held liable for damages caused by his negligence.

Even if it be the fact that the driver of the automobile may not have heard or seen the approaching fire apparatus, that fact does not excuse that driver. It is the duty of every driver of a motor vehicle to give full time and attention to his driving, to watch the road and not to [201] do anything that would make it difficult for him to either hear or see other vehicles.

Section 50(a) of the Traffic Regulations provides as follows:

> Upon the immediate approach of an authorized emergency vehicle – and of course a Fire Department apparatus is an emergency vehicle – making use of audible and visual sounds meeting the requirements of Section 131.1 of these regulations, the driver of every other vehicle shall yield the right of way and shall immediately drive to a position parallel to and as close as possible to the righthand edge or curb of the roadway, clear of any intersection, and shall stop and remain in such position until the authorized emergency vehicle has passed.

So far as the Fire Department apparatus is concerned, a Fire Department truck when responding to a fire and sounding a siren and blinking its red lights has the right of way over all other vehicles on the roadway. It is not bound by the speed limit and it is not bound to stop or even slow down at stop signs or to have regard for traffic lights. Consequently, it is not negligence on the part of the driver [202] of a Fire Department vehicle under such circumstances to pass stop signs or traffic lights, since it is the duty of all moving traffic to stop when such a Fire Department vehicle approaches sounding a siren and blinking its red lights. The driver of the Fire Department vehicle under such circumstances has a right to assume that all moving traffic will

stop and to proceed upon that assumption. Naturally, that is not a license to drive carelessly or recklessly. For example, the driver of a Fire Department apparatus does not have a right to run into a parked car. The driver of a Fire Department apparatus must indeed use due care, but due care in the case of the driver of a Fire Department vehicle responding to a fire is entirely different from the due care required of the driver of other vehicles. Due care is measured by the nature of the vehicle and the surrounding circumstances.

Now, as I said to you before, if two or more persons are all negligent and the negligence of each one is one of the proximate causes of the accident, then each of such persons is liable for the entire damages that result from the injury.

So, in this case, if the driver of the automobile was alone guilty of negligence and her negligence was a proximate cause of the accident, the plaintiff is entitled to recover [203] damages. So, too, even if both the driver of the automobile and the driver of the Fire Department vehicle were each guilty of negligence and the negligence of each one was one of the proximate causes of the accident, even then your verdict should be for the plaintiff because the plaintiff would be entitled to recover damages as against the driver of the automobile. It is only if the driver of the fire truck was alone negligent and his negligence alone caused the accident that the plaintiff would not be entitled to recover damages in this case.

Now the evidence in this case may be briefly summarized as follows, and please bear in mind my remarks to you that my summary or discussion of the evidence is intended only to help you, it is not binding on you. You must make your own decision on the facts and on the evidence. That is your function and your duty and your responsibility.

Evidence has been introduced that the automobile was driving south on Third Street and that the fire truck was proceeding east on Sheridan Street, that the fire truck was sounding its siren and blinking its red lights. Testimony to that effect was given both by Henry V. Walsh, the driver

of the fire truck, and by John Stratford, who appears to [204] have been a disinterested witness who was driving an automobile north on Third Street, who heard the siren and pulled over to the curb and stopped. Evidence was introduced tending to show that the automobile kept on going, perhaps because the driver did not hear or see the fire truck and did not slow down; that the fire truck, on the other hand, when it reached the intersection, tried to slow down and serve to avoid the accident but did not succeed. The police officer who investigated the accident testified that no skid marks were laid down by the automobile, which may give rise to an inference that the driver of the automobile did not apply the brakes. He testified that the fire truck laid down skid marks.

It is for the jury to determine whether the driver of the automobile was negligent and if so, whether the driver's negligence was the cause or one of the causes of the accident.

Now your verdict here will be in the form of written answers to written questions which I shall hand to you and your foreman will fill in the answers when you agree upon what the answers should be.

The first question will be: Was Ruth E. Hoover, the driver of the automobile, guilty of any negligence that was the proximate cause or one of the proximate causes of the [205] accident? And you will answer that yes or no. If your answer is no, that will end the case and there will be a judgment for the defendant. If you answer yes, then you will have to determine the amount of damages that should be awarded and there will be two questions dealing with damages. First, what damages should be awarded for the death of Margaret Marsh?

The amount of damages for death is peculiarly a question for the jury to determine in its sound judgment. The law, however, lays down certain rules that the jury must follow in arriving at the amount of damages. Damages for death must be limited to damages of a pecuniary nature, that is, a financial or money loss sustained as a result of the death. The law does not compensate for grief, for mental suffering,

for mental anguish or sentimental loss caused by the death of a member of one's family. That may seem a little cold blooded to you, but it really is not. Money cannot compensate for grief and therefore the law does not attempt to do the impossible. The law limits damages for death only to such a sum as will fairly and reasonably compensate the members of the family of the deceased for any financial loss sustained by reason of the death, and it is for you to [206] determine in such event what is the financial loss sustained by the two sons of the deceased.

In determining the amount of such a loss the jury may take into consideration payments that the deceased may have made to her next of kin and to what extent it was reasonably probable that such payments would have continued during the life of the deceased and how long the life might have continued. Such payments may have been gifts and made without any legal obligation, but they may be considered and the likelihood of their continuance may also be considered.

As I said before, the determination of the amount is peculiarly within the sound judgment of the jury. You have a right to consider the testimony that the deceased had two adult sons, each with a family of his own, and that from time to time she made certain gifts to them, and that her own income was about $7,000 a year.

Now the evidence shows that at the time of her death she was 68 years old. According to so-called mortality tables she had a life expectancy of 13.9 years, but you must remember that life expectancy tables are based on statistics of average future duration of life of persons of specified ages. They are only averages based on voluminous statistics. The state of health of the deceased may be considered. A [207] person in good health may live longer than the average, barring any accidents, while a person in poor health may live a shorter time than the average.

In this case there is medical testimony to the effect that the deceased had leukemia and her doctor expressed the opinion that she had a life expectancy of five to seven years.

So your second question will be, what amount of damages should be awarded the next of kin of Margaret V. Marsh for her death, and you will answer that in dollars.

Now, then, there is also a cause of action for any disabilities--I want to add something I overlooked. In addition to the other damages for her death you will add the funeral bill, $1,098.80, and the bill of Providence Hospital of $96. Those are items that the plaintiff would be entitled to recover if she is awarded any damages. The two items amount to $1,194.80 and that should be added to the amount of financial loss causes by the death.

Now, then, there is a cause of action for whatever disabilities the deceased suffered personally as a result of the accident. The law is that if a person has been injured by the negligence of another and dies between the time that the injury occurs and the trial of the action, the estate of that [208] person may recover the damages that the person would have recovered if that person had lived, with one exception, there may be no allowance for pain and suffering. The estate of the deceased would be entitled to an allowance for the disability caused by the accident during that person's life expectancy. Again the amount of such an allowance is peculiarly a question for the jury.

The medical testimony is to the effect that the deceased sustained multiple fractures of ribs, a punctured lung, fractured pelvis, and various lacerations, and that if she had lived it would have taken her from three to six months to recover from the injuries. Again the amount of damages is for you to consider.

So the third question is, what amount of damages, if any, should be awarded to the estate of Margaret V. Marsh for the disabilities caused to her by the accident, without making any allowance for pain and suffering.

Your verdict will be in the form of answers to these questions. As of course you are aware, your verdict must be reached by unanimous vote.

Are there any suggestions or objections?

MR. QUINN: May we approach the bench, Your Honor.

THE COURT: Yes, indeed. [209]

[AT THE BENCH]

THE COURT: Yes, Mr. Quinn.

MR. QUINN: On behalf of the defendant I note the following objections to your instructions, Your Honor. Initially, you indicated that it was immaterial——

THE COURT: Will you tell me what you are objecting to?

MR. QUINN: I am objecting to your instruction, the first part, in which you stated that the negligence of any other person was immaterial to this cause of action.

THE COURT: Very well.

MR. QUINN: And that anything else was extraneous and should be laid to one side.

The basis of my objection is that if the negligence of this fire truck operator was the sole cause of this accident, that is material.

THE COURT: Very well. What is next?

MR. QUINN: I object to the phraseology in your instruction with reference to whether or not the decedent Hoover may or may not have heard or seen the fire truck. You indicated whether or not she saw it was of no import, indicating that it wasn't a factor, the fact she didn't see or hear it would equate to negligence. [210]

THE COURT: Will you give me that again?

MR. QUINN: You said the fact that she may not have heard or seen the fire truck is of no import because she had to yield the right of way anyway. So I object to this instruction because I think the phraseology of it takes out the question whether or not she could have seen or could have heard.

THE COURT: Leaves out what?

MR. QUINN: Leaves out of the instruction the question as to whether she could have heard it.

THE COURT: I instructed the jury that it was her duty to hear.

Anything else?

MR. QUINN: Yes, Your Honor. I object to your reference to the Fire Department apparatus, that he has the right of way and that he does not have to stop or slow down.

THE COURT: Very well. Anything else?

MR. QUINN: Yes, Your Honor. I would like to note specifically the regulation requires him to slow down.

THE COURT; Very well.

MR. QUINN: Also, the Court has refused – I requested an instruction with reference to the speed at which the Fire Department can travel.

[211] THE COURT: Denied.

How many more have you got?

MR. QUINN: Just three or four, Your Honor.

THE COURT: You may have four. I want to get the jury out and it is time for us to recess for lunch.

MR. QUINN: I know, Your Honor. I would like to put these on the record.

I object to your summary of the evidence as prejudicial to the defendant.

THE COURT: You can't object to that unless you find something wrong in it.

Now what is next?

MR. QUINN: Of course, Your Honor, I object to any instruction with reference to the award of disability, awarding any amount of money for disability of this person. I have previously proffered –

THE COURT: You have already made a motion on that and you may renew the motion if there is an award.

MR. QUINN: I would then assume that my prior objections –

THE COURT: This is not the time to renew prior objections. The jury is sitting and waiting to retire.

MR. QUINN: Also with reference to the instruction [212] on disability, I believe that you stated, made a reference to the fact that they could award damages –

THE COURT: Tell me what you are objecting to.

MR. QUINN: I object to the inclusion in that instruction of the referral to the term life expectancy.

THE COURT: Very well.

MR. QUINN: My point being that it is restricted to three to six months.

THE COURT: I used the language of Hudson against Lazarus on that point.

MR. BOYNTON: I have none, Your Honor.

[IN OPEN COURT:]

THE COURT: Ladies and gentlemen of the jury, the 12 regular jurors may now retire. Upon reaching the jury room you will first select a foreman from amongst yourselves who will act as your chairman, preside over your deliberations and speak for you in returning your verdict, and then you will proceed to reach a verdict which will be in the form of answers to questions which will be handed to you through the Marshal. Your foreman will fill in the answers when you have agreed upon them. I suggest you take up each question one at a time in the order in which they are stated.

The 12 regular jurors will follow the Marshal. Will [213] the two alternate jurors please retain their seats for a moment.

(At 12:31 p.m. the jury retired to deliberate.)

* * *

2:45 p.m.

(The following proceedings were had out of the presence of the jury:)

THE DEPUTY CLERK: Marsh v. Dunn.

THE COURT: Gentlemen, the Court has a note from the jury reading as follows: "Total amount of gifts, cash and checks for 1961, '62 and '63," signed by the foreman of the jury.

Now, gentlemen, of course the Court has notes of the testimony, but if you can agree upon the figures, I will give the figures you agree upon. When I say agree upon the figures I mean agree on what the testimony shows.

[Pause]

MR. BOYNTON: Your Honor, we would agree that the total amounts received in checks for the year 1961 is $650.46.

THE COURT: That is the total amount of what?

MR. BOYNTON: 1961 the total amount in checks. Added to that is a cash figure of $750.

[214]

THE COURT: What is the total amount of gifts?

MR. BOYNTON: $1,446 for 1961.

THE COURT: Is that figure agreed upon? When I say agreed upon I mean do you agree that the testimony shows that?

MR. QUINN: Yes, but I would ask Your Honor that the distinction be made between that from checks and that from the testimony of the witness.

THE COURT: I don't see any reason for making any distinction.

What is '62?

MR. BOYNTON: 1962 is $1,812.28.

THE COURT: Suppose we drop the cents. $1,446 in '61, $1,812 in '62. And what in '63?

MR. BOYNTON: $1,508. This is for William J. Marsh, Your Honor.

THE COURT: That is for both of them?

MR. BOYNTON: This is for William J. Marsh.

THE COURT: The jury asked for totals of gifts, cash and checks for '61, '62 and '63. I want to give them the total figures. That is the help they asked for.

I can calculate it myself from the testimony, but I would rather have you gentlemen agree upon what the testimony [215] shows.

MR. QUINN: Your Honor, I think my point as to the cash is that I contend there is a conflict as to what the witness indicated –

THE COURT: I am going to say that that is what they claim.

MR. QUINN: I don't have any objections as to the amount of the checks; but as to the cash amount, that is the question I have.

THE COURT: I am going to tell the jury that is the amount that is claimed as being the total gifts. I am not going to make a finding for them that that is the amount of gifts. I will say that the plaintiffs claim that that is the amount of the gifts.

[Pause.]

MR. BOYNTON: Your Honor, the total amount for 1961 for both brothers would be $1,600; for 1962 would be $2,012; for 1963, $1,808.

THE COURT: I am going to tell the jury that that is what the plaintiffs testified to and that is what they claim. I am not going to make a finding that is the amount.

MR. QUINN: Your Honor, I only note my objection on the grounds that I think it should be separated as to checks [216] and what the testimony was.

THE COURT: Bring in the jury.

Don't keep renewing the same thing. Once you make a point and the Court rules against you, I don't think it is courteous to the Court to keep renewing the same thing.

[The jury resumed the jury box.]

THE COURT: Mr. Foreman, the Court has your note reading as follows: "Total amount of gifts, cash and checks for 1961, '62, '63."

Upon receipt of your note the Court asked counsel to total up the amounts that appear in the testimony. The testimony shows that the two brothers claim that the total amount of gifts, both cash and checks, that they received is as follows: In 1961, $1,600; in 1962, $2,012; in 1963, $1,808.

I think that answers your question.

THE FOREMAN: Yes.

THE COURT: You may retire again and resume your deliberations, ladies and gentlemen.

[217] JURY VERDICT

3:50 p.m.

[The jury resumed the jury box.]

THE DEPUTY CLERK: Will the foreman please rise.

Mr. Foreman, has the jury agreed upon a verdict?

THE FOREMAN: Yes, sir.

THE DEPUTY CLERK: As to Question No. 1, was Ruth E. Hoover, the driver of the automobile, guilty of any negligence that was the proximate cause or one of the proximate causes of the accident, what is your answer?

THE FOREMAN: Yes.

THE DEPUTY CLERK: As to Question No. 2, what amount of damages should be awarded the next of kin of Margaret V. Marsh for her death, what is your answer?

THE FOREMAN: Eight thousand dollars.

THE DEPUTY CLERK: As to Question 3, what amount of damages, if any, should be awarded to the estate of Margaret V. Marsh for the disabilities caused to her by the accident without making any allowance for pain and suffering, what is your answer?

THE FOREMAN: None.

THE DEPUTY CLERK: Members of the jury, please rise.

Members of the jury, your foreman says that your answer as to Question No. 1 is yes, that your answer as to Question No. 2 is $8,000, and that your answer as to Question No. 3 is none, and this is your verdict so say you each and all.

Be seated, please.

THE COURT: Ladies and gentlemen of the jury, the Court wishes to thank you for the time and the attention that you have given to this case.

I don't know whether it is of any interest to you but the Court is of the opinion that you made a very wise

disposition of the case and the Court agrees with your answers to each of the three questions.

THE DEPUTY CLERK: Members of the jury, you are excused, please return to the jury lounge.

THE COURT: Will counsel come to the bench.

[AT THE BENCH:]

THE COURT: This award is within the range that was discussed at the bench and I think the jury was very reasonable in not allowing anything for future disability.

You have never tried a jury case before me before. Have you tried other jury cases in this court?

MR. BOYNTON: No, I haven't.

THE COURT: You have been before me on motions.

MR. BOYNTON: Yes, Your Honor.

[219] THE COURT: This is your first jury case?

MR. BOYNTON: My first in District Court. I have had one in General Sessions.

THE COURT: You have done very well.

MR. BOYNTON: Thank you.

THE COURT: Thank you, gentlemen.

[The trial stood concluded.]

BRIEF FOR APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,169

ROBERT L. DUNN,
Executor of the Estate of
RUTH E. HOOVER,
Deceased,

Appellant,

v.

WILLIAM J. MARSH,
Executor of the Estate of
MARGARET V. MARSH,
Deceased,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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STATEMENT OF QUESTIONS PRESENTED

I

The question presented is that the instructions of the Court were erroneous and prejudicial to the defendant in that:

a.) The Court erroneously instructed the jury as to the law with reference to emergency vehicles and vehicles subject to the emergency vehicle regulations.

b.) The Court's summary of the evidence was prejudicial to the defendant.

c.) The Court erroneously suggested that the negligence of the fire truck operator was immaterial to the case.

d.) The Court erroneously reinstructed the jury as to gifts and contributions made by the deceased.

II

The question presented is that the conduct of the Court in the trial of this case was prejudicial to the defendant.

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v.

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Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This case is an action for damages due to negligence for wrongful death and under the Survival Act. Jurisdiction of the District Court was based upon Title 11, Sections 305, 306; Title 20, Section 501; Title 12, Section 201; Title 16, Section 1201, D.C. Code, 1961 Edition and because the amount in controversy exceeded $10,000.00. After a jury

verdict in favor of appellee, this appeal followed. Jurisdiction of this Court is based upon United States Code, Title 28, Section 1291.

STATEMENT OF THE CASE

I

This action arises out of a motor vehicle collision that occurred at the intersection of Third and Sheridan Streets, N.W., Washington, D.C., on November 19, 1963. A District of Columbia fire truck operated by one Henry V. Walsh was proceeding east on Sheridan Street which was controlled by a stop sign. The fire truck was responding to a fire alarm and was an authorized emergency vehicle. The vehicle with which the fire truck collided was proceeding south on Sheridan Street. It was operated by Ruth E. Hoover and Margaret V. Marsh was a passenger in this vehicle. As a result of the collision, both Ruth E. Hoover and Margaret V. Marsh died from the injuries they sustained. The appellant (defendant below) is the duly appointed executor of the estate of Ruth E. Hoover. The appellee (plaintiff below) is the duly appointed executor of the estate of Margaret V. Marsh.

The appellee's action sought recovery under the wrongful death and survival statutes of the D.C. Code (Titles 16-2701 and 12-201). The principal claim asserted in addition to burial and hospital expenses was for loss of contributions, gifts and support to the two adult sons of the decedent. The jury at the conclusion of the case awarded $8,000.00 to the next of kin of the decedent.

Henry V. Walsh, the operator of the fire truck, stated he was proceeding east on Sheridan Street at approximately 25 m.p.h. about one half block behind another fire truck (JA 20, 21, 22). He described the intersection of Third and Sheridan Streets as a dangerous one because of a row of buildings that extend from the south west corner along Sheridan Street (JA 21). The north west side of the intersection was described as open except for shrubbery along Third Street. Mr. Walsh stated he was braking as he ap-

proached the intersection because it was downgrade (JA 22), he looked both ways, saw nothing, looked a second time to his left and saw the Hoover vehicle twenty-five (25) feet to his left. He tried to put on his brakes but could not avoid the collision (JA 22, 23). (The other car made no effort to avoid the collision (JA 22)).

On cross examination, he indicated the bushes along Third Street could obstruct his vision (in the direction the Hoover vehicle was proceeding) (JA 27), that he slowed to 15 – 20 m.p.h. fifty (50) feet prior to the intersection (JA 28) and that his vehicle was even with the building line of the south side of Third Street when he first saw the Hoover vehicle (JA 29). Mr. Walsh admitted telling Officer Wiseman he was proceeding 25–30 m.p.h. as he proceeded on Sheridan toward the intersection (JA 34). He explained this as due to his physical condition and later asked the officer to change it to 15–20 m.p.h. (JA 35).

Officer Walter R. Wiseman of the Accident Investigation Unit, Metropolitan Police Department, testified that in his investigation at the scene of the accident, he determined the approximate point of impact as 12 feet nine inches south of the north curb lane of Sheridan Street and 17 feet east of the west curb of Third Street (JA 45). The fire engine travelled 49 feet after impact, the passenger car, 95 feet (JA 45). The fire engine had nine feet of skid marks prior to impact, the automobile none (JA 45). The fire engine was the striking vehicle (JA 44). Officer Wiseman also indicated the location of parked cars near the intersection and identified one on defendant's exhibit No. 2 (a photograph) as the approximate location of the first parked car on the north west side of Third Street, approximately 85 feet from the intersection (JA 46-47).

Officer Wiseman indicated Mr. Walsh in response to questions asked by the officer at the scene indicated he (Mr. Walsh) was travelling 25 – 30 m.p.h. as he approached the scene and when the accident occurred (JA 48) and that when Mr. Walsh first noticed the Hoover vehicle it was 10 feet away (JA 48).

The Officer also stated the windows in the Hoover vehicle were closed at the time of the accident (JA 48).

Witness John Stratford stated he was proceeding north on Third Street when upon hearing a siren, he pulled over to his right about one half block prior to Sheridan Street (JA 50). After seeing a fire engine cross Third Street, he then heard and saw the second fire engine. He first saw this engine as it entered the intersection or passed the building line (JA 50). He also saw the Hoover car approaching and proceed into the intersection without making any effort to stop or swerve (JA 50).

On cross-examination, Mr. Stratford indicated he was aware fire engines run in two's approximately one half block apart (JA 55). He estimated the fire engine's speed at 30-35 m.p.h.; noticed no change in its speed nor did he hear any squeal of tires (JA 52).

Wayne Fox who at the time of the accident was twelve years old and a school crossing guard, stated that he was standing by the trash can on the southwest corner of Third and Sheridan Streets (JA 96-97). He heard three fire trucks come down Sheridan, two had passed and went up North Dakota Avenue, the third he first saw at the alley preceding the block of stores on Sheridan Street (JA 98). He could not state the speed of the fire truck but said it was going pretty fast. He watched it approach the intersection, apparently slow somewhat and then accelerate (JA 98) and the collision occurred. On cross examination, he stated he did see the Dodge and that it made no attempt to stop or swerve prior to the accident (JA 100).

II

The principal claim asserted by the executor on behalf of the next of kin was for loss of contributions and gifts that the decedent may have given them during her lifetime.

William J. Marsh, one of the sons of the decedent Margaret V. Marsh and also her executor, testified that his mother had made gifts and contributions for which he had

cancelled checks totaling $1,061.16 in 1961, $1,140.28 in 1962 and $858.00 in 1963 (JA 69-70). Mr. Marsh also testified that cash gifts would amount to approximately $750.00 per year. On cross examination, William Marsh conceded that in his deposition he had stated that the total value of gifts in any given year would be anywhere from $500.00 to $1,500.00 (JA 79).

Richard W. Marsh, the other son of Margaret V. Marsh, stated that contributions to him from his mother would total between $150.00 and $200.00 (JA 83)

Certain portions of the depositions of the Marsh brothers were read into evidence. Richard indicated that gifts to him would have amounted to less than $200.00 per year (JA 102). William Marsh stated that gifts made to him were usually done so by checks which he would write (JA 102).

Oscar B. Hunter, M.D., a medical witness for appellee, stated that Margaret V. Marsh's life expectancy was from five to seven years (JA 75). Appellee also introduced the Department of Health, Education and Welfare life tables which indicated that a woman of Mrs. Marsh's age had a life expectancy of 13.9 years (JA 86).

STATEMENT OF POINTS

1.) The instructions of the Court as to the emergency vehicle regulations were contrary to these regulations.

2.) The Court's summary of the evidence was not fair and impartial but only included those facts favorable to the plaintiff.

3.) The Court in its charge stated the negligence of the fire truck operator was immaterial. This statement excluded the possibility that his negligence may have been the sole cause of the accident.

4.) In response to a note from the jury the Court reinstructed the jury as to gifts and contributions. The further

charge removed from the jury's consideration the conflict in the evidence as to gifts by checks and cash.

5.) The conduct of the trial judge was prejudicial to the defendant in that his remarks and attitude removed from the jury's considerations the issues of liability and the extent of the damages sustained.

REGULATIONS INVOLVED

District of Columbia Traffic and Motor Vehicle Regulations.

Section 6 – Authorized Emergency Vehicles

(a) The driver of an authorized emergency vehicle, when responding to an emergency call or when in the pursuit of an actual or suspected violator of the law or when responding to but not upon returning from a fire alarm, may exercise the privileges set forth in this section, but subject to the conditions herein contained.

(b) The driver of an authorized emergency vehicle may:

1. Park or stand, irrespective of the provisions of these regulations;
2. Proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation;
3. Exceed the prima facie speed limits so long as he does not endanger life or property; except that this provision does not apply to ambulances; (C.O. No. 64-714)
4. Disregard regulations governing direction of movement or turning in specified directions.

(c) The exemptions herein granted to an authorized emergency vehicle shall apply only when the driver of any said vehicle while in motion sounds audible signal by bell, siren, or exhaust whistle as may be reasonably necessary, and when the vehicle is equipped as specified in Sec. 131.1 (a) and (b). (C.O. No. 57-1086)

(d) The foregoing provisions shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons nor shall such provisions protect the driver from the consequences of his reckless disregard for the safety of others.

Section 50 – Operation of Vehicles and Streetcars on Approach of Authorized Emergency Vehicles.

(a) Upon the immediate approach of an authorized emergency vehicle making use of audible and visual signals meeting the requirements of Section 131.1 of these regulations, or of a police vehicle properly and lawfully making use of an audible signal only:

1. The driver of every other vehicle shall yield the right-of-way and shall immediately drive to a position parallel to, and as close as possible to, the right-hand edge or curb of the roadway, clear of any intersection, and shall stop and remain in such position until the authorized emergency vehicle has passed, except when otherwise directed by a police officer.

(b) This section shall not operate to relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons using the highway.

SUMMARY OF ARGUMENT

The emergency vehicle regulations of the District of Columbia place certain duties upon the drivers involved. Although the emergency vehicle has the right of way, this right of way is subject to distinct limitations which require that he slow down before passing stop signs and that he not endanger life and property when exceeding the speed limit. The evidence in this case presented a conflict as to the emergency vehicle operator's actions when he passed thru a stop sign. It is contended that his failure to act in accord with the regulations caused the accident. The Court's instructions dis-

regarded the duties placed upon such an operator and were tantamount to directing a verdict for the plaintiff.

Although a Federal Judge has the right to comment on the evidence in his charge, this comment must be fair and impartial. The summary in this case referred only to facts favorable to the plaintiff and disregarded entirely the facts which could have supported a finding that the negligence of the fire truck operator was the sole cause of the accident.

In an automobile accident, there can be more than one proximate cause. If there is more than one, damages can be assessed against one tortfeasor alone. However, when a possible tortfeasor is not a defendant, it is error to state that his actions are immaterial to this case. Such a statement has the effect of confusing the issues as to proximate causes. In this case it accented the Court's evaluation of the defense; that there was no valid defense to this action.

The jury should be allowed to determine factual issues and necessarily resolve conflicts in the testimony. The testimony as to the gifts of the decedents was conflicting as to the amounts given by cash or check. When the jury requested further instructions as to the amount of gifts for various years, the Court should have distinguished between cash and checks. Failure to do so effectively removed this issue from the jury's consideration.

A trial judge, upon discussing a case with counsel prior to trial, may form an opinion as to its merits. However, this opinion should not be made obvious during the trial nor should his opinion govern his remarks during trial and his instructions so that the jury will render a verdict in accord with this opinion. The Court in this case was not impressed with the defense and made this evident in various remarks and criticisms during the trial. The end result of this conduct was prejudice to the defendant.

ARGUMENT

I

(a) An authorized emergency vehicle in the District of Columbia may proceed past a stop sign and exceed the posted speed limit under certain conditions. The regulation gives to such a vehicle the right of way but also places certain duties upon the driver.

Section 6 of the Regulations provides that an emergency vehicle may proceed past a stop sign but only after slowing down as may be necessary for safe operation. Section 6 also allows such a vehicle to exceed the speed limit so long as life or property are not endangered.

Section 6 and 50 also provide that these regulations do not relieve the driver of an emergency vehicle from the duty of driving with the regard for the safety of all persons using the highway.

The Court's instructions with reference to the fire truck were as follows:

> So far as the Fire Department apparatus is concerned, a Fire Department truck when responding to a fire and sounding a siren and blinking its red lights has the right of way over all other vehicles on the roadway. It is not bound by the speed limit and it is not bound to stop or even slow down at stop signs or to have regard for traffic lights. Consequently, it is not negligence on the part of the driver of a Fire Department vehicle under such circumstances, to pass stop signs or traffic lights, since it is the duty of all moving traffic to stop when such a Fire Department vehicle approaches sounding a siren and blinking its red lights. The driver of the Fire Department vehicle under such circumstances has a right to assume that all moving traffic will stop and to proceed upon that assumption. Naturally, that is not a license to drive carelessly or recklessly. For example, the driver of a Fire Department apparatus does not have a right

> to run into a parked car. The driver of a Fire Department apparatus must indeed use due care, but due care in the case of the driver of Fire Department vehicle responding to a fire is entirely different from the due care required of the driver of other vehicles. Due care is measured by the nature of the vehicle and the surrounding circumstances. (JA 128-29)

This instruction was clearly erroneous for two reasons. It is directly contrary to the Traffic Regulations which place three distinct duties upon the emergency vehicle operator. The duty to slow down when passing a stop sign, the duty not to endanger life and property when exceeding the speed limit and the duty to drive with due regard for the safety of others. The Court's instruction effectively places no limit on the acts of the driver except striking a parked car.

The testimony in this case presented a sharp conflict as to the actions of the emergency driver. His statements to the police at the scene that he was travelling 25 to 30 m.p.h. before and at impact, the witness Stratford's, called by plaintiff, estimation of the fire truck's speed at 30 to 35 m.p.h. and the testimony of defense witness Stokes that the vehicle was coming fast, "broke" its speed then accelerated, are all inconsistent with the duties laid upon the driver by these regulations. The end result of this instruction was to direct a verdict for the plaintiff.

The instruction is not only contrary to the regulations stated but contrary to the law of this jurisdiction.

In *Bland v. Hershey*, 60 App. D.C. 226, 50 F.2d, 991, it was declared that the right of way is not absolute. This doctrine has been followed by the Courts of this jurisdiction thru the years. It was clearly declared applicable to emergency vehicles in the case of *District of Columbia v. Lapiana*, 194 A.2d 303. The significance of the Lapiana case is that a judgment against the District of Columbia was affirmed when its authorized emergency vehicle passed thru a red light. The Court stated:

> We have previously held that right-of-way at intersections is not absolute, but relative, according to the special circumstances of each case. Although these decisions involved uncontrolled intersections, we are satisfied that the same rule is applicable to an intersection controlled by traffic lights where one of the cars is an emergency vehicle entering against a red light. Although the right to enter and cross an intersection is ordinarily open to the vehicle facing a green or "go" light, the traffic regulations have made an exception in the case of an ambulance upon an emergency run, which is given priority in crossing an intersection upon a red or "stop" signal, but with this right goes a commensurate responsibility to exercise care not to injure other persons upon the highway. Whether under the circumstances in the present case the ambulance driver exercised the degree of care called for by the traffic regulations was a question of fact which was resolved against him, the finding being that he was solely responsible for the collision with the other vehicle.

The obvious significance of these cases is that the Courts have interpreted Regulations 6 and 50 as placing definite duties and obligations upon the emergency vehicle operator. These duties are certainly much greater than merely avoiding parked cars.

During the charge to the jury, the Court referred to only one traffic regulation, Section 50 (a) (JA 128). This regulation speaks to the duty of the driver of other vehicles upon the approach of an emergency vehicle. The Court only read section (a), section (b) which describes the duty of the emergency operator was omitted. This act of the Court completely distorted the effect of the regulations. The Court allowed defense counsel to read Section 6, parts a, b and c and Section 50, part b to the jury at the conclusion of his case (JA 105-106). There seems to be no sound reason for reading to the jury one particular section dealing only with the defendant's driver during the charge. To do so magnifies the

importance of the regulation and suggests what counsel read was without merit. It is submitted that part of the instruction was also prejudicial and tantamount to directing a verdict for the plaintiff.

(b) The Court's instructions with reference to vehicles subject to the emergency regulations were also erroneous. As noted above, the Court read only that portion of Section 50 which referred to the unfavored driver. In addition, the Court stated the following in its charge as to the duties of defendant's operator:

> Even if it be the fact that the driver of the automobile may not have heard or seen the approaching fire apparatus, that fact does not excuse the driver. It is the duty of every driver of a motor vehicle to give full time and attention to his driving, to watch the road and not do anything that would make it difficult for him to either hear or see other vehicles. (JA 127-28)

This instruction places an absolute duty on the defendant to both see and hear. If this be the law, then there is no valid reason for placing any obligation on the emergency operator for he can assume all will see and hear his lights and siren.

The rule with reference to hearing was set out in *Jackson v. Scheneck*, 174 A.2d 353, where the Court, in affirming a judgment against the unfavored driver, noted ample opportunity existed to discover the emergency vehicles present. This, then, should have been one of the questions in this case – did Mrs. Hoover have the opportunity to hear the siren and act accordingly. It is submitted that this rule is entirely different from the one enunciated in the charge which states failure to hear is no excuse.

The jury had facts before it such as the intersection itself, the obstructions present, the closed windows on defendant's car, the speed of the fire truck from which they may have concluded that Mrs. Hoover did not have the opportunity to see or hear.

II

The instructions of the Court were erroneous and prejudicial to the defense for two other reasons.

(a) The Court's summary of the evidence was as follows:

> Evidence has been introduced that the automobile was driving south on Third Street and that the fire truck was proceeding east on Sheridan Street, that the fire truck was sounding its siren and blinking its red lights. Testimony to that effect was given both by Henry V. Walsh, the driver of the fire truck, and by John Stratford, who appears to have been disinterested witness who was driving an automobile north on Third Street, who heard the siren and pulled over to the curb and stopped. Evidence was introduced tending to show that the automobile kept on going, perhaps because the driver did not hear or see the fire truck and did not slow down; that the fire truck, on the other hand, when it reached the intersection, tried to slow down and swerve to avoid the accident but did not succeed. The police officer who investigated the accident testified that no skid marks were laid down by the automobile, which may give rise to an inference that the driver of the automobile did not apply the brakes. He testified that the fire truck laid down skid marks. (JA 203-04)

If we concede the right of the trial judge to comment on the evidence of *Heinecke v. United States,* 111 U.S. App. D.C. 98, 294 F.2d 727, it must necessarily follow that such comment must be fair, accurate, and impartial. *United States v. Hanrahan,* 248 F. Supp. 471. The Judge must also advise the jury that they are not bound by his comments.

The summary noted above was not fair and impartial and resulted in prejudice to the defense.

The Court did not mention the speed of the fire truck (30 to 35 miles per hour) by witness Stratford; the fire truck operator's statement to the police that he was pro-

ceeding 25 to 30 miles per hour prior to noticing the danger and at time of impact; the testimony of Wayne Bates (who also appears to have been a disinterested witness) that the fire truck was coming fast, "broke" his speed and then accelerated into the intersection.

The Court also suggested that skid marks suggested certain inferences. Concededly, this is correct but it is also true that ability to brake is also a vital factor in this case. There seems to be no reason why an inference favorable to one side should be noted in disregard of inferences to the other favorable. This suggestion is of greater significance when defendant has no opportunity to rebut the inferences by argument.

The summary does not suggest one fact favorable to the defense. Following the summary, the Court then stated:

> It is for the jury to determine whether the driver of the automobile was negligent and if so, whether the driver's negligence was the cause or one of the causes of the accident. (JA 130).

The Court then proceeded to the question of damages and possible verdicts. The summary of the evidence was the jury's last review of the liability issue. It was important that this review be based on all the facts and inferences.

(b) The Court's charge also suggested the immateriality of someone else's negligence:

> Now it is immaterial whether or not there was someone else also who was guilty of negligence that was also a proximate cause of the accident. It not infrequently happens that there may be several people guilty of negligence and the negligence of each may be a proximate cause of the accident.
>
> The question for you to determine on that aspect of the case, and the only question, is whether the driver of the automobile, Ruth Hoover, was guilty of negligence that was a proximate cause of the accident. You must concentrate on the issue so far as liability is concerned. Everything else is extraneous and must be laid to one side. (JA 122-23).

This particular instruction came early in the Court's charge. It effectively set the tenor of the entire charge. Certainly there is materiality to the actions of someone else who may have caused the accident or conversely whose actions constituted the defense of this case. This statement is of greater significance when the Court only referred to and read part of Section 50 and not Section 6 of the regulations. The jury thus could have believed the regulation read by defense counsel was of no importance, was extraneous and should be laid aside.

III

During the jury's deliberations of this case, a note was submitted requesting the total amount of gifts, cash and checks for the years 1961, 1962 and 1963. (JA 135). The Court requested that counsel agree upon these figures. It was appellant's position that the gifts by check could be ascertained but there was a conflict as to the cash amounts. William Marsh, in his deposition, stated total gifts to him were from $500.00 to $1,500.00 per year, he also stated that gifts made to him were usually in the form of checks written by him. The facts thus presented an issue as to the cash gifts. The Court in its response to this note totalled both cash and checks together. This was tantamount to stating these amounts were proven without question. It was suggested to the Court that the amounts be separated as to cash and checks. This request was denied, and another factual issue removed from the jury's consideration.

IV

The conduct of the Court in the trial of this case was prejudicial to the defendant.

Prior to the commencement of this trial, the Court held a bench conference at which the Court stated the fire truck could ignore stop signs (JA 15). This comment apparently was the basis of the Court's position during the entire trial, that there was no defense to the claims asserted by the plaintiff.

At various bench conferences, the Court again reiterated its position that the emergency vehicle was not bound by stop signs (JA 42). The Court stated the case was a waste of the Court's time and the time of other litigants who were waiting to have their cases tried (JA 43). The Court continued to suggest the case should be settled (JA 43, 82, 86, 88).

The Court's attitude toward the case was reflected in various comments to defense counsel in the presence of the jury. Defense counsel was accused of improperly summarizing a witness's answer (JA 52), of repeating the same thing and wasting time (JA 55, 87) and of making unfounded objections (JA 71).

The Court also made comment as to certain objections of counsel suggesting that objections not be made from counsel table (JA 20), that legalistic phraseology be used (JA 20), that counsel was testifying (JA 40). The Court also suggested that counsel should have had his witness present in Court so the trial could be concluded (JA 85). However, the witness's presence was discussed at a bench conference and the Court concurred in the suggestion that he be called on Monday morning (JA 80-82). There was no reason for this statement before the jury when it was further obvious that the case could not be concluded on that particular day. There was also no reason for the Court's extended comment on whether Mr. Walsh should be excused after his testimony (JA 38). Nor was there any reason for the Court's comment after the police officer testified as to the 25 m.p.h. speed limit that speed limits were not binding on the fire engine (JA 44).

The Court's attitude was reflected in various bench conferences in which the Court suggested a big verdict could not be remitted (JA 88). When counsel attempted to note his objections to the Court's charge, the Court at one point stated he could make four more objections, that he could not object to the Court's summary of the evidence and that he was to hurry because it was time to recess for

lunch (JA 133-35). The exchange between counsel and Court as to the jury's note resulted in a denial to counsel of the presentation of his position in the matter (JA 135-37).

It seems obvious that the Court made an initial judgment as to the merits of this case and then proceeded to implement this judgment during the entire trial. The actual trial of this case consumed only a few hours thus the remarks and attitudes of the trial judge had to have a strong and almost compelling influence on the jury. It is submitted that the end result of these comments and attitude had to prejudice the defendant and they had no alternative but to render the verdict they did.

CONCLUSION

It is respectfully submitted that this Court should reverse the judgment of the District Court and order a new trial as to all the issues involved.

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BRIEF FOR APPELLEE

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21169

ROBERT L. DUNN, Executor of the Estate of
Ruth E. Hoover, Deceased,
Appellant,

v.

WILLIAM J. MARSH, Executor of the Estate of
Margaret V. Marsh, Deceased,
Appellee.

Appeal from the United States District Court for the District of Columbia

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QUESTIONS PRESENTED

1. Whether the court properly instructed the jury as to the duties of a driver of an authorized emergency vehicle and the corresponding duties of the drivers of other vehicles and then properly related these duties to the issue of negligence before the jury.
2. Whether the summary of the evidence by the court to the jury when viewed as a whole was in any manner prejudicial to the appellant.
3. Whether the court properly responded to a request from the jury regarding the total amount of gifts testified to during the course of trial.

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---

BRIEF FOR APPELLEE

RESTATEMENT OF THE CASE

On November 19, 1963 at about three o'clock P.M., appellee's decedent, Margaret V. Marsh, was a passenger in an automobile owned and operated by appellant's decedent, Ruth E. Hoover, which was proceeding in a southerly direction on Third Street, N.W., approaching and into the intersection of Sheridan Street, N.W. in the

District of Columbia [JA 3]. At that time and place, an authorized emergency vehicle of the Fire Department of the District of Columbia was responding to a fire alarm and was being operated by an employee of the District of Columbia, Henry V. Walsh, in an easterly direction on Sheridan Street, N.W., approaching and into the intersection of Third Street, N.W. [JA 3]. A violent collision occurred within the intersection between the automobile and the fire engine. As a result of the injuries received in the collision, appellee's decedent died within two hours [JA 3].

An action was instituted against the Executor of the Estate of Ruth E. Hoover, Robert L. Dunn, by the Executor of the Estate of Margaret V. Marsh pursuant to the Wrongful Death and Survival Statutes in the District of Columbia [JA 2-5].

The evidence at trial indicated that the fire engine involved in the collision was the second of two engines responding to a local alarm and that they were traveling approximately one-half block apart [JA 20]. Both engines had their oscillating red lights flashing and their sirens turned on [JA 19, 23, 50, 97]. The first fire engine had crossed the intersection of Sheridan Street, N.W. and Third Street, N.W. prior to the collision [JA 20, 51].

The driver of the fire engine involved in the accident testified that on the north side of Sheridan Street there was an open playground in front of a school which ran to the corner of Sheridan Street and Third Street and that there was some shrubbery along the west side of Third Street [JA 21]. There was a stop sign on the southwest corner of Sheridan Street [JA 24]. He stated that Sheridan Street had a down-grade into Third Street and that as he first started down the hill on Sheridan Street he was driving approximately 25 miles an hour and braking the fire engine; that as he entered the inter-

section, he was braking even more then traveling between 15 and 20 miles an hour [JA 28]. He stated that he looked both ways and as he approached the intersection; he then looked to his left again and saw that an automobile was coming from the left, south on Third Street [JA 22-23, 28-29]. At that time he put his brakes on hard and turned the fire engine to the right in an effort to avoid an accident but the automobile continued at undiminished speed into the intersection making no attempt to avoid the collision [JA 22, 29].

A second witness, John E. Stratford, testified that when he was driving his automobile north on Third Street and crossed Rittenhouse Street, the street immediately to the south of the intersection of Third and Sheridan Streets, he heard loud fire engine sirens and pulled over to the right coming to a stop approximately mid-way in the block [JA 50, 51]. Although at the time the windows of Mr. Stratford's automobile were rolled up, he could still hear the sirens [JA 53]. He stated that he observed one fire engine cross the intersection [JA 50-51, 53] and the automobile operated by appellant's decedent proceed into the intersection at an undiminished speed not making any effort to avoid the collision with the second fire engine [JA 50]. He stated he did observe that the fire engine tried to avoid the accident by braking and turning [JA 52].

A witness called on behalf of the appellant, Wayne T. Fox, was a twelve year old school guard standing on the southwest corner of Sheridan and Third Streets [JA 97]. Although he testified that there were three fire engines, he did state that the fire truck involved in the accident was the last fire engine [JA 97]. He testified that he did see the fire truck attempt to stop [JA 98] but that the automobile did not make any attempt to avoid the accident but proceeded into the intersection at undiminished speed making no attempt to stop or swerve [JA 100].

The investigating policeman, Officer Walter R. Wiseman, testified that according to his investigation the approximate point of impact between the fire engine and the automobile was twelve feet nine inches (12′ 9″) south of the north curb line of Sheridan Street, N.W. and seventeen feet (17′ 0″) east of the west curb of Third Street, N.W. which would place point of collision approximately in the center of the intersection [JA 45]. He also stated that there was evidence of skid marks made by the fire engine which started eleven feet (11′ 0″) south of the north curb and nine feet (9′ 0″) east of the west curb [JA 41]. There were no skid marks indicated from the automobile driven by appellant's decedent [JA 41].

Although there was conflict from the witnesses as to the precise speed of the fire engine involved in the accident [JA 29, 52, 98], all witnesses that viewed the collision testified that the automobile driven by appellant's decedent proceeded into the intersection at an undiminished speed and that there was no effort made to stop the automobile prior to impact [JA 22, 50, 100]. All witnesses testified that the driver of the fire engine made an effort to avoid the collision [JA 29, 52, 98].

The regulation from the Traffic and Motor Vehicle Regulations of the District of Columbia concerning the duty of drivers of other vehicles confronted with an emergency vehicle was introduced into evidence on behalf of the appellee as well as regulations relating to reckless driving and full time and attention [JA 57-58]. Appellant introduced regulations concerning the duty of the driver of an authorized emergency vehicle [JA 105-106].

The damages claimed by the executor on behalf of the next of kin were based upon the loss of gifts and contributions that were terminated as a result of the wrongful death of appellee's decedent. A basis for the claim by the next of kin was established by illustrating the pattern of

such amounts that appellee's decedent had given her two sons in 1961, 1962 and 1963 [JA 59-60, 67-73, 83-84]. The executor of the estate and youngest son of the deceased had a power of attorney over one of his mother's bank accounts since his father's death in 1959, and, consequently, handled many of his mother's business affairs [JA 59]. His testimony indicated that appellee's decedent made gifts represented by cancelled checks, to both sons totalling $1,061.16 in 1961, $1,140.28 in 1962 and in 1963, the year in which she was killed, $858.00 [JA 70, 83, 136]. In addition, each son testified that their mother was accustomed to annually giving each cash amounts: to William J. Marsh "between $150 and $200" per year and to Richard W. Marsh "around $750 a year" [JA 83, 70]. The total amount of gifts testified to by both sons for the two years preceding their mother's death and in the year of her death was approximately $1,600.00 in 1961, $2,-012.00 in 1962 and $1,808.00 in 1963 [JA 137]. It was agreed by both counsel that the testimony was that these totals were the amounts given in testimony by both brothers [JA 137].

Counsel for appellant introduced certain portions of depositions taken of the sons of appellee's decedent relating to the amount of gifts received from their mother. Richard W. Marsh stated in his deposition that the total gifts he received from his mother each year "was less than $200." [JA 102]. On direct examination during the trial his testimony was similar in that he testified that such annual gifts "would total between $150 and $200." [JA 83].

William J. Marsh, the other son and executor of the estate, testified in his deposition that the approximate total value of the gifts received each year from his mother was "any where from $500 to $1,500." [JA 79]. On direct examination he gave similar testimony by stating that he received annual cash amounts of $750 and, testi-

fying from cancelled checks, showed he received by checks $650 in 1961, $1,062.28 in 1962 and 1963 $858 by check [JA 70].

Dr. Oscar B. Hunter, a medical witness for the appellee, treated appellee's decedent for lymphocytic leukemia for six or seven years prior to her death [JA 73]. He stated that her condition was relatively mild and required treatment only from time to time. Further, he believed that her general physical condition was "quite good" [JA 74]. He stated that at the time of her death her life expectancy would be of "what the average person at this age would be and this would average around 5 to 7 years" [JA 75]. Appellee introduced life tables promulgated by the Department of Health, Education and Welfare of the United States Government which indicated that the life expectancy of a 68 year old white female in 1963 was 13.9 years [JA 86].

Although appellee pursued a Survival Action for disabilities caused by the accident, the jury allowed no recovery [JA 4, 10, 138]. The jury brought in a verdict which found appellant's decedent guilty of negligence that was the proximate cause or one of the proximate causes of the accident. Accordingly, the jury awarded damages under the Wrongful Death Act to the next of kin in the amount of $8,000 [JA 10, 138].

REGULATIONS, RULE AND STATUTE INVOLVED

Federal Rules of Civil Procedure, Rule 61, 28 U.S.C.A.:

HARMLESS ERROR

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacat-

ing, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

DISTRICT OF COLUMBIA TRAFFIC AND MOTOR VEHICLE REGULATIONS

Section 6: AUTHORIZED EMERGENCY VEHICLES

(a) The driver of an authorized emergency vehicle, when responding to an emergency call or when in the pursuit of an actual or suspected violator of the law or when responding to but not upon returning from a fire alarm, may exercise the privileges set forth in this section, but subject to the conditions herein contained.

(b) The driver of an authorized emergency vehicle may:

1. Park or stand, irrespective of the provisions of these regulations;
2. Proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation;
3. Exceed the prima facie speed limits so long as he does not endanger life or property; except that this provision does not apply to ambulances;
4. Disregard regulations governing direction of movement or turning in specified directions.

(c) The exemptions herein granted to an authorized emergency vehicle shall apply only when the driver of any said vehicle while in motion sounds audible signal by bell, siren, or exhaust whistle as may be reasonably necessary, and when the vehicle is equipped as specified in Sec. 131.1 (a) and (b).

(d) The foregoing provisions shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of his reckless disregard for the safety of others.

Section 21: RECKLESS DRIVING

(a) Any person who drives any vehicle upon a highway carelessly and heedlessly in willful or wanton disregard of the rights or safety of others, or without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property, shall be guilty of reckless driving.

Section 50: OPERATION OF VEHICLES AND STREETCARS ON APPROACH OF AUTHORIZED EMERGENCY VEHICLES

(a) Upon the immediate approach of an authorized emergency vehicle making use of audible and visual signals meeting the requirements of Section 131.1 of these regulations, or of a police vehicle properly and lawfully making use of an audible signal only:

1. The driver of every other vehicle shall yield the right-of-way, shall immediately drive to a position parallel to, and as close as possible to, the right-hand edge or curb of the roadway, clear of any intersection, and shall stop and remain in such position until the authorized emergency vehicle has passed, except when otherwise directed by a police officer.

2. Upon the approach of an authorized emergency vehicle, as stated above, the operator of every streetcar shall immediately stop such car clear of any intersection and keep it in such position until the authorized emergency vehicle has

passed, except when otherwise directed by a police officer.

3. Upon the approach of an authorized emergency vehicle, as above stated, every pedestrian shall yield the right-of-way and immediately proceed to the nearest point of safety.

(b) This section shall not operate to relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons using the highway.

Section 99: OBSTRUCTION TO DRIVER'S VIEW OR DRIVING MECHANISM

(c) An operator shall, when operating a vehicle, give his full time and attention to the operation of the same.

STATUTE

D. C. Code § 16-2701 (1961, Supp. V 1966)

When, by an injury done or happening within the limits of the District, the death of a person is caused by the wrongful act, neglect, or default of a person or corporation, and the act, neglect, or default is such as will, if death does not ensue, entitle the person injured, or if the person injured is a married woman, entitle her husband, either separately or by joining with the wife, to maintain an action and recover damages, the person who or corporation that is liable if death does not ensue is liable to an action for damages for the death, notwithstanding the death of the person injured, even though the death is caused under circumstances that constitute a felony.

The damages shall be assessed with reference to the injury resulting from the act, neglect, or default causing the death, to the spouse and the next of kin of the deceased person; and shall include the reasonable expenses of last illness and burial. Where there

is a surviving spouse, the jury shall allocate the portion of its verdict payable to the spouse and next of kin, respectively, according to the finding of damage to the spouse and next of kin. If, in a particular case, the verdict is deemed excessive the trial judge or the United States Court of Appeals for the District of Columbia Circuit, on appeal of the cause, may order a reduction of the verdict. An action may not be maintained pursuant to this chapter if the party injured by the wrongful act, neglect, or default has recovered damages therefor during his life.

SUMMARY OF ARGUMENT

Appellant presents several arguments in its brief to support a reversal of the lower court judgment which are groundless in law and are unfounded in fact as clearly illustrated by the record as a whole. Initially, it is claimed that there was a conflict as to the emergency vehicle operator's actions. When the testimony is read in its entirety there is absolutely *no* conflict as to the actions of the driver of the emergency vehicle. Not only is there no conflict concerning what took place but the testimony supports the conclusion that his conduct was in complete accord with the regulations governing the operation of authorized emergency vehicles in the District of Columbia.

Within this context the trial judge consistently and repeatedly admonished the jury that it was their sole recollection of the facts that was controlling and that any comment on the evidence or remarks by the judge were not in any way binding upon the jury. After these repeated statements, the court summarized certain portions of the evidence which in review clearly show that the only manner in which it was unfavorable to the appellant is that all of this evidence was completely uncontradicted during trial. Therefore, if this evidence

was unfavorable to the defense of this, case, it was because the facts so demonstrated.

The testimony as to the gifts given by appellee's decedent to her next of kin was not conflicting as apparently contended by appellant. The testimony at trial and the testimony presented in the depositions clearly shows that the amounts testified to on each occasion were similar. However, even if the cash gift amounts were eliminated from the jury's consideration and only consideration were given to the amounts represented by cancelled checks, it is clear that the award made by the jury showed no prejudicial results to the appellant. Further, the court properly responded to the request from the jury as to the total amounts received in cash and by check in that it presented the exact information through the agreement of counsel that was desired by the jury.

Appellant's complaint about the alleged judicial prejudice that was exhibited to the jury by the trial judge is completely groundless. All citations to the record by the appellant to support this argument have absolutely no bearing on the liability issues of this case. All questions concerning the liability issues and the trial judge's opinion were held without the hearing of the jury. Consequently, appellant's complaint of judicial prejudice is no more than dissatisfaction with the trial judge's reaction to the demeanor and procedural conduct of appellant's counsel.

The court properly instructed the jury on the duties of the driver of an automobile being approached by an authorized emergency vehicle and the rules governing the operation of an emergency vehicle and properly related these duties to the question of negligence in the case. The court properly instructed the jury that if they found that the negligence of the fire engine driver was the sole proximate cause of the accident, appellee would not be entitled to recover damages. He further instructed that

if the jury found that both the driver of the automobile and the driver of the fire department vehicle were guilty of negligence, and the negligence of each was one of the proximate causes of the accident, the jury should bring in a verdict for the appellee for if two or more persons are negligent and the negligence of each is one of the proximate causes of the accident then each is liable for the entire damages that result from the injury.

It was unconverted that the fire engine involved in the accident had its oscillating red light and siren turned on; that it was proceeding approximately one-half block behind another fire engine; that the proceeding fire engine had already passed through the intersection; that there was an open field between the fire engine and the automobile driven by the appellant's decedent thereby permitting appellant's decedent to hear the sirens; that a witness driving an automobile one block away from the intersection with his automobile windows rolled up and with buildings between the fire engine and his automobile was still able to hear the siren and to take appropriate actions; that the driver of the fire engine attempted to avoid the accident by braking and turning. More importantly, however, the evidence was completely uncontradicted that appellant's decedent made no effort to avoid the accident but proceeded into the intersection at an undiminished speed and the absence of skid marks indicated that she made no attempt to stop. Consequently, the jury could reasonably conclude that the proximate cause or one of the proximate causes of the accident was the negligence of appellant's decedent.

ARGUMENT

I. The Court Correctly Instructed The Jury With Reference To The Duties And Obligations Of Drivers Of Emergency Vehicles And The Corresponding Duties Of Drivers Of Other Vehicles And Then Properly Related The Duties To The Issues Before The Jury.

Appellant in its brief erroneously attempts to separate into different questions the issues relating to the instructions given by the trial court on the duties of the driver of an emergency vehicle, the obligations of the drivers of other vehicles and the question of the negligence before the jury [Appellant's Brief, page i]. The only defense to the issue of negligence of appellant's decedent argued by appellant was that the negligence of the driver of the fire engine was the cause of the accident [JA 93, 119, 133]. Appellant apparently fails to recognize that even though the jury could have found that the driver of the fire engine was negligent, the proximate cause of the accident may have been the consequence of the *concurrent negligence* of both the driver of fire truck and appellant's decedent. Consequently, the negligence of appellant's decedent would be considered, in law, the sole cause of the accident thereby subjecting the estate of appellant's decedent to liability for the total damages claimed. By attempting to separate the issues concerning the instructions on the duties of the respective drivers from the consideration of concurrent negligence, appellant improperly separates the issues that must be considered in context.

A. *The issue of proximate cause was properly presented to the jury on the instruction of concurrent negligence as well as the question of the sole negligence of the fire engine driver.*

It is well settled that injuries or damages may be the consequence of the concurring negligence of two or more persons and that the negligence of each may be the proxi-

mate cause of the results. Under such facts, each negligent person is liable for the total damages. Thus, in the eyes of the law *contributing* to an injury by a tortfeasor is precisely the same as *causing* the injury. *Danzansky* v. *Zimbolist*, 70 App. D.C. 236, 105 F. 2d 457 (D.C. Cir. 1939); *Campbell* v. *District of Columbia*, 64 App. D.C. 375, 78 F.2d 725 (D.C. Cir. 1936). The trial judge properly placed this concept before the jury in the factual context of the case:

> Now, as I said to you before, if two or more persons are all negligent and the negligence of each one is one of the proximate causes of the accident, then each of such persons is liable for the entire damages that result from the injury.
>
> So, in this case, if the driver of the automobile was alone guilty of negligence and her negligence was a proximate cause of the accident, the plaintiff is entitled to recover damages. So, too, even if both the driver of the automobile and the driver of the Fire Department vehicle were each guilty of negligence and the negligence of each one was one of the proximate causes of the accident, even then your verdict should be for the plaintiff because plaintiff would be entitled to recover damages as against the driver of the automobile. It is only if the driver of the fire truck were alone negligent and his negligence alone caused the accident that plaintiff would not be entitled to recover damages in this case [JA 129].

The last sentence of this quoted portion clearly belies appellant's contention that the trial court stated that the negligence of the fire truck operator was immaterial and thereby "excluded the possibility that his negligence may have been the sole cause of the accident" [Appellant's Brief, page 5]. The jury was specifically informed that if they found that the driver of the fire truck was alone negligent the appellee would not be entitled to recover. The court correctly pointed out, however, that the li-

ability issue before the jury *was whether appellant's decedent was guilty of negligence that was a proximate cause of the accident.* Appellant complains that this portion of the charge came early in the instructions thereby setting an unfavorable tenor to the defense of the action [JA 123]. The above quoted portion, however, *came subsequently* and, therefore, would have obviously erased any unfavorable "tenor" as to the exact issue before the jury. [JA 129].

In centering on the question of the negligence of appellant's decedent, there was certainly sufficient evidence demonstrating such negligence to the jury: All the eye witnesses stated that the automobile driven by appellant's decedent proceeded into the intersection at undiminished speed [JA 22, 50, 100]; all eye witnesses testifying stated that the driver of the fire engine attempted to avoid the accident [JA 22, 52, 98]; the investigating policeman testified that skid marks were in evidence as to the fire engine but no skid marks appeared that would have been made by automobile [JA 41]; all eye witnesses testified that the fire engines had their oscillating red lights turned on and the sirens turned on to warn those ahead of their approaching [JA 19, 23, 50, 97], and that the sirens were even heard by the witness Stratford who was a block away with his automobile windows rolled up [JA 50, 53].

Consequently, the jury had ample evidence upon which to base a finding that appellant's decedent was negligent; whether or not the driver of the fire engine was also negligent *is immaterial* as to the liability of appellant.

B. *The instructions given to the jury on the duties of the driver of an emergency vehicle and the duties of drivers of other vehicles was in accord with the regulations.*

The instructions given by the court concerning the duty of the driver of an authorized vehicle was perfectly with-

in the Traffic and Motor Vehicle Regulations of the District of Columbia, §§ 6 and 50. The regulations exempt the driver of an authorized vehicle from stopping at a stop sign and obeying speed limits with the caveat that he must operate with due regard for the safety of all persons under the surrounding circumstances. The court's instruction concerning the regulations and their limitations was accurately presented. Appellant ineffectively cites the illustration given by the court concerning the striking of a parked car and erroneously concludes that the court's instruction "effectively places no limit on the acts of the driver except striking a parked car." [Appellant's Brief, page 10]. This argument ignores the entire thrust of the charge. The court quite correctly stated that even with the exemptions from obeying traffic regulations that a driver of an emergency vehicle has, "it is not a license to drive carelessly or recklessly" and that:

> The driver of a Fire Department apparatus must indeed use due care, but due care in the case of the driver of a Fire Department vehicle responding to a fire is entirely different from the due care required of the driver of other vehicles. Due care is measured by the nature of the vehicle and the surrounding circumstances. [JA 129]

It is submitted that this summary is in complete accord with the appropriate District of Columbia Traffic and Motor Vehicle Regulations as evidenced by the language employed in those sections:

> Slowing down *as may be necessary* for safe operations. [Emphasis added] (Section 6(b)(2)).

> duty to drive with *due* regard for safety of all persons . . . nor shall such provisions protect the driver from the consequences of his *reckless* disregard for the safety of others. [Emphasis added] (Section 6(d)).

> duty to drive with *due* regard for the safety of all persons using the highway. [Emphasis added] (Section 50(b)).

Within these regulations it was for the jury to determine whether or not the driver of the fire engine was alone negligent in causing the accident. Whether or not they in fact found that he was negligent is unimportant if they found that appellant's decedent was negligent.

Appellant cites the case of *Jackson* v. *Schenick*, 174 A.2d 353 (D.C. Mun. App. 1961) to support the contention that one of the issues before the jury *should have been* whether appellant's decedent had an opportunity to hear the sirens. In that case an action was instituted involving claims and cross-claims for property damage resulting from a collision between a District of Columbia fire truck and a panel truck operated by one Jackson. The court sitting without a jury attributed the sole responsibility for the collision to the negligent operation of the vehicle operated by Jackson. In addition to finding excessive speed, the court predicted its decision on the failure of the driver, Jackson, to yield the right-of-way to an emergency apparatus pursuant to Section 50 of the Traffic and Motor Vehicle Regulations of the District of Columbia. On appeal the appellant maintained that the duty to yield does not arise until a motorist has actual warning of the emergency vehicle's presence in the vicinity and that Jackson did not receive such a warning. In upholding the lower court decision, the appellate court found there was testimony in the case from one of the witnesses that she was aroused from sleep by a wailing siren and that a full ten seconds elapsed from the time of the sound of the crash. The appellate court, therefore, determined that since she was able to hear the siren well in advance of the collision, it was reasonable that the lower court inferred that Jackson would have heard the warning had he been driving with due care and attention.

Similarly, in the instant case there was testimony from the witness Stratford that he was able to hear the sirens a full block from the intersection where the accident took place even with his automobile windows rolled up and buildings between him and the fire engines [JA 53]. Certainly, then, the jury could infer that appellant's decedent would have heard the warning had she been driving with due care and attention. As stated in the *Jackson* case, a person not only must see what is reasonably there to be seen but that

> [t]his same degree of alertness will be required of a party with respect to his other senses and mental faculties. *Jackson* v. *Schenick*, 174 A.2d at 355.

Thus, in the instant case the jury was justified in determining that an audible warning signal given by two fire engines should provide ample opportunity to discover the presence of emergency vehicles and that appellant's decedent had sufficient time to react in the manner prescribed by the Traffic Regulations in the District of Columbia.

Appellant also cites the case of the *District of Columbia* v. *Lapiana*, 194 A.2d 303 (D.C. Mun. App. 1963) for the proposition that the right-of-way of an emergency vehicle is not absolute but relative to the circumstances. Appellee does not quarrel with this proposition of law as stated earlier in reference to the court's instruction on this point. Appellee would point out, however, that in the *Lapiana* case an intersectional collision occurred between an automobile and an ambulance of the District of Columbia where there was testimony to support the finding that although the ambulance had its siren operating and red light flashing, the ambulance driver's vision at the time was obstructed by a bus and that the bus contributed to preventing the driver of the automobile from hearing or seeing the flashing red light of the ambulance; that the driver of the automobile was not put on notice by the presence of the ambulance by other motorists pulling to the curb; that no other person heard the siren except a

person whose position at the scene was not given; and, finally, that the ambulance driver never saw the car until impact. In the instant case the facts clearly support findings that there was no obstruction to prevent appellant's decedent from hearing the sirens of both engines due to the undisputed fact that there was an open field between her automobile and the fire engines [JA 21]; that the driver of the automobile a block away from the intersection with buildings between him and the fire engines was able to hear the sirens even with the windows of his car rolled up [JA 53]; that appellant's decedent should have been put on notice by the passing of the first fire engine through the intersection [JA 20, 50, 97]; that the driver of the fire engine attempted to avoid the accident by braking and turning, however, no effort was made by appellant's decedent to stop [JA 22, 50, 100]. Finally, it is clear that whether appellant's decedent exercised that degree of care called for by the traffic regulations was a question of fact which was properly put to the jury to determine the degree of care exercised by the drivers. Contrary to appellant's position, the testimony in this case presents no "sharp conflict as to the actions of the emergency driver" nor were they "inconsistent with the duties laid upon the driver by these regulations." [Appellant's Brief, page 10]. Nor, in fact, does there seem to be a "sharp conflict" as to the actions of appellant's decedent in violating the duties imposed upon the driver of an automobile on the approach of an authorized vehicle: there was absolutely no evidence to contradict the fact that the fire engines were making use of audible and visual signals which were seen and heard by others; that appellant's decedent failed to pull to the right hand curb, stop and yield the right-of-way which gives rise to the conclusion that appellant's decedent drove carelessly and heedlessly without due caution by failing to give full time and attention to the operation of the automobile in complete violation of Sections 21(a),

50(a)(1) and 99(c) of the District of Columbia Traffic and Motor Vehicle Regulations.

It is respectfully submitted, therefore, that when the entire charge relating to the negligence issue is considered—*including the negligence of both drivers*—the question of whether appellant's decedent was guilty of any negligence that was the proximate cause or one of the proximate causes of the accident was properly and fairly presented to the jury for their exclusion determination.

II. The Conduct Of The Entire Trial By The Trial Judge Was Completely Within The Bounds Of Judicial Discretion And Was Not Prejudicial To The Rights of Appellant.

A. *The trial judge throughout his charge to the jury consistently advised them that it was their recollection of the evidence and facts that would be binding and that they were in no way bound by the court's remarks on the evidence.*

The appellant quite improperly indicated in its brief that the trial judge did not advise the jury that they were not bound by his comments on the evidence [Appellant's Brief, page 13]. The record is replete, however, with instructions from the court that the jury's recollection of the facts was controlling and that the judge's remarks were in no way binding upon the jury. In the initial portion of the charge the court clearly indicated that the jury's determination of negligence based on the facts and evidence was exclusive and that they must reach their conclusion "solely on the basis of the evidence introduced at this trial" [JA 123]. Over and above these statements, however, the court throughout the entire instructions indicated that the jury is the final judge on the facts:

> [A]s of course you are aware, it is my function and my duty to instruct the jury concerning the law

that must govern the disposition of the case on trial. You are obligated to take the law from the Court and to follow the Court's instructions as to the law. On the other hand, you ladies and gentlemen of the jury are the final judges of the facts and you must decide the facts yourselves on the basis of the evidence introduced at the trial and then apply the rules of law that I shall summarize for you to the facts as you find them to be. [JA 124].

* * * *

My summary or discussion or comments on the facts and on the evidence are not binding on you, they are intended only to help you, and you need attach such weight to them only as you deem high and proper. If your understanding or your recollection or your view of the evidence in any respect differs from mine, then it is your recollection, your understanding and your view of the evidence that must prevail because, let me repeat, the final decision on the facts is within your province. The jury, so to speak, is sovereign when it comes to deciding on the facts. My instructions are binding on you only as concerns the law. [JA 124].

* * * *

[I]n this case there are certain circumstances that you may want to consider in connection with weighing the evidence, but that is a matter for your judgment and not mine and for your decision and not mine. [JA 125].

* * * *

You are the sole judges of the credibility of the witnesses. That means that it is for you to decide whether to believe any witness, the extent to which any witness should be credited and the weight that should be attached to the testimony of any witness. Whenever there is a conflict in the testimony it is for the jury to resolve the conflict and to determine what the facts are and where the truth lies. [JA 125].

Appellant in citing the allegedly objectionable summary of the evidence made by the trial court [Appellant's Brief, page 14], negligently failed to include the paragraph which proceeded it:

> Now the evidence in this case may be briefly summarized as follows, and please bear in mind my remarks to you that my summary or discussion of the evidence is intended only to help you, it is not binding upon you. You must make your own decision on the facts and on the evidence. That is your function and your duty and your responsibility. [JA 129].

And after the court briefly and accurately summarized the evidence, it again reiterated that the jury was the final judge of the facts by stating:

> It is for the jury to determine whether the driver of the automobile was negligent and if so, whether the driver's negligence was the cause or one of the causes of the accident. [JA 130].

These repeated statements by the trial court, including the statements before and after the allegedly objectionable summary, clearly indicated to the jury that it was their exclusive province to determine factual issues and resolve any conflicts in the testimony.

In the context of these caveats the court exercised its discretion and summarized a portion of the evidence [JA 203-204]. Appellant contends that the summary was not fair and impartial [Appellant's Brief, pages 5, 13]. However, a close review of this allegedly impartial summary discloses that not only is it an accurate summary of the testimony *but that it contains not one fact that was contested or contradicted at the trial.* Possibly the reason why the summary does not contain "one fact favorable to the defense" is that not one of them was or could be contradicted in the defense of this case.

Clearly, a federal judge in a civil action may comment on the evidence, *even to the extent of expressing an opinion;* the only limitation is that the jury is given to understand that the opinion expressed is not binding upon them and that they are free to make their own decision. *Vicksburg & M. R. Co.* v. *Putnam*, 118 U.S. 545 (1886); *Paul* v. *Elliot*, 107 F.2d 872 (9th Cir. 1940). It is submitted that the quoted portion of the court's charge is in no manner a comment or opinion but, conceding for the sake of argument that it does reach the degree of a judicial comment, the court's continued admonishment that all questions of fact were to be left to the sole discretion of the jury, independently of anything said by the court, clearly would relieve the charge of any material or prejudicial objection in this respect. As stated in *Quercia* v. *United States*, 289 U.S. 466 (1933):

> In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. In charging the jury, the trial judge is not limited to instructions of an abstract sort. It is within his province, whenever he thinks it necessary, to assist the jury in arriving at a just conclusion by explaining and commenting upon the evidence, by drawing their attention to the parts of it which he thinks important; and he may express his opinion upon the facts, provided he makes it clear to the jury that all matters of fact are submitted to their determination. 289 U.S. at 469.

The record clearly indicates that the jury was repeatedly informed that all matters of fact were for their exclusive determination; no rule of law was incorrectly stated, and no abuse of discretion was evident from the record. Therefore, the jury was permitted to make a fair and dispassionate determination of liability based upon the evidence.

B. *There was clearly no conduct exhibited by the trial court before the jury that indicated judicial bias or prejudice.*

Appellant erroneously contends that the trial court exhibited prejudice before the jury and thereby "removed from the jury's consideration the issues of liability and the extent of damages sustained." [Appellant's Brief, page 6]. Yet all citations to the record appellant urges to illustrate the alleged prejudice as to liability *took place out of the hearing of the jury* [Appellant's Brief, pages 6-8 citing transcript: JA 15, 42, 43, 82, 86, 88, 133-135, 135-137]. Even in a criminal case, a statement by the judge to counsel out of the hearing of the jury that in his opinion defendants are guilty of the offense charged is not a sufficient ground for disqualification. *United States* v. *Hanrahan*, 248 F. Supp. 471 (D.C.C. 1965). The mere fact that the court indicates out of the hearing of the jury that it is not impressed with the defendant's side of the case is not prejudicial where such an *attitude is not reflected in any statements to the jury. Kimmel* v. *Campbell*, 82 U.S. App. D.C. 121, 161 F.2d 378 (D.C. Cir. 1947). *All* other references cited by appellant to supposedly show prejudice have absolutely nothing to do with the liability issue [Appellant's Brief, pages 6-8 citing transcript: JA 52, 55, 87, 71, 20, 40, 85, 80-81, 38, 44]. The mere fact that the trial judge in his opinion feels that counsel is improperly summarizing a witness's answer, is redundant or is making unfounded objections has absolutely no relevancy to the liability issues and clearly did not remove from "the jury's considerations of the issue of liability and the extent of damages sustained." [Appellant's Brief, page 6]. When the allegedly objectionable remarks are read in context it is clear that appellant is attempting to equate judicial comment on the procedural aspects of the trial conduct of appellant's counsel with the judicial prejudice as to the liability issues in the case. Nothing the court said in the

presence of the jury was directed to the liability issue presented to the jury; it was the negligence issue that they were to consider not the trial conduct of defense counsel. No partiality or bias is evident in the trial of this case which would prejudice appellant's rights. Even assuming that possibly too much conversation between the judge and counsel took place

> it must be remembered that a mere deviation from the best court room standards does not constitute reversible error. *Gutshall* v. *Wood*, 74 App. D.C. 379, 382, 123 F.2d 174, 177 (D.C. Cir. 1941).

It is respectfully submitted that there was proper judicial conduct by the trial court which was consistent with substantial justice without the existence of prejudicial error and, therefore, the judgement should not be disturbed. Rule 61, Federal Rules Civil Procedure, 28 U.S.C.A.

It should also be noted that the trial court extended several courtesies to counsel for the appellant during the course of this trial. For example, the trial judge permitted the appellant during the appellee's case to introduce into evidence certain exhibits [JA 30]; the trial judge requested appellee's witness to remain in the court after he had been excused after a cross-examination and voluntarily called both counsel to the bench because he anticipated that counsel for the appellant intended to impeach the witness with contradictory statements. He then informed appellant's counsel that he had not laid the proper foundation on cross examination. The judge then permitted appellant's counsel to recall the witness for that express purpose [JA 33]. It should also be pointed out that the "extended comment" on whether Mr. Walsh should be excused after his testimony was clearly prolonged because counsel for the appellant failed to accept the court's ruling [JA 38-39]. And regarding the statement before the jury concerning the presence of

the witness for the appellant, it should be noted that the court prefaced its remarks with a statement "I want to give both parties an opportunity to present all their evidence" [JA 86].

Therefore, it is respectfully submitted that the references contained in appellant's Brief are completely exaggerated by taking them out of context and the illustrations are patently divorced from any questions of liability wherein prejudice by the court would be exhibited. The record considered in its entirety demonstrates that appellant and appellant's counsel received before the jury a fair and impartial trial.

III. The Trial Court Properly Responded To The Jury's Request For Information On The Testimony Relating To The Total Amount Of Gifts Received By The Next Of Kin.

After the jury had retired, they sent a note to the court which requested certain information:

> "Total amount of gifts, cash and checks for 1961, '62 and '63." [JA 135].

The court chose the proper course of responding by suggesting counsel to agree on the total figures requested for the years indicated [JA 135]. Counsel for appellant agreed that the figures supplied were in conformity with the testimony [JA 137]. He requested, however, that a distinction be rendered by the court between the checks and the cash [JA 137].

Appellant contends that by giving the total amounts without instructing as to the distinction between the checks and cash "another factual issue [was] removed from the jury's consideration." [Appellant's Brief, page 12]. This is clearly erroneous for several obvious reasons. Primary is the fact that the jury brought back a verdict of only $8,000 [JA 10, 138]. Under the District of Columbia Wrongful Death Act the last medical expenses

and funeral bill are recoverable. In this case they totaled $2,084 [JA 72]. Thus, concluding liability, this amount would be recoverable. Presumably, then, that left approximately $6,000 awarded for the loss of gifts flowing from appellee's decedent to her sons. The cancelled checks introduced into evidence showed that both sons received $1,061.16 in 1961, $1,140.28 in 1962 and $858 in 1963 [JA 70]. This averages to approximately $1,020 a year to both sons evidenced by the checks alone. The testimony as to the life expectancy in this case ranged from 5 to 7 years to 13.9 years.[1] [JA 75, 85]. Even if the jury took the middle ground of six years of the most unfavorable range, it is clear that the average annual gifts multiplied by six years would give an award of over $6,000. Consequently, excluding *all* references to cash and considering just the cancelled checks and taking the most unfavorable testimony concerning the life expectancy of appellee's decedent, it is perfectly clear that appellant has demonstrated no resulting prejudice in the trial court's refusal to distinguish between the gifts made by appellee's decedent in cash and those made by check when the amount of the verdict is considered.

The most compelling reason why such a distinction between the cancelled checks and cash amounts was unnecessary is that a close review of the testimony by the next of kin shows that it was in no manner unreasonably inconsistent with the deposition testimony which apparently the appellant relies upon for inconsistency. Richard W. Marsh testified in his deposition that his total amount of gifts which included those gifts made in cash and by

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[1] It should be pointed out, however, that this range was presented with the statement that "she had an expectancy of what the average person at that age would be and this would average around five to seven years" [JA 75]. The Health, Education and Welfare mortality tables introduced by appellee showed, however, that the "average" person at that age had a life expectancy of 13.9 years [JA 85].

check "was less than $200.00" [JA 102]. On direct examination his testimony was completely consistent although differently phrased in that he stated that such annual gifts ranged "between $150.00 and $200.00" [JA 83]. Consequently, there is no contradiction or inconsistency as to the testimony of Richard W. Marsh.

William J. Marsh stated in his deposition that the total value of gifts in a given year, including those made by check and by cash would be "from $500.00 to $1500.00" [JA 79]. On direct testimony he testified that he received "around $750" in cash per year. Testifying from cancelled checks, he demonstrated that in 1961 he received $650.46, $1062.28 in 1962 and $858.00 in 1963 [JA 70]. Adding the $750.00 received in cash annually to these individual amounts shows that they were consistent with a maximum amount he testified to in his deposition. Further, it is perfectly clear that the cancelled checks had more efficacy in supporting such testimony than approximations without the benefit of documentary evidence.

Finally, the request from the jury did not seek the distinction between cash and cancelled checks which appellant attempted to impose. They asked for the "total amount of gifts, cash and checks . . . ." [JA 135]. The court chose the most convenient and nonprejudicial manner in complying with the request by having both counsel agree to the amounts. It is respectfully submitted therefore that appellant has not sustained the burden or showing any prejudice by the manner in which the requested information was provided to the jury. Further, considering the amount of gifts with the range of life expectancy before the jury, the award illustrated that if there was error in not making a distinction it was obviously harmless thereby providing no cause to disturb the judgment. Rule 61, Federal Rules Civil Procedure 28 U.S.C.A.

CONCLUSION

It is respectfully submitted that the trial in the lower court was conducted without substantial error and that appellant had a fair and impartial presentation of the liability issue before the jury. The jury was properly charged regarding the negligence of each driver and whether or not they found that the driver of the fire engine was negligent is clearly unimportant unless they found that his negligence was the sole cause of the accident; if it was found to be concurring, appellee is still entitled to recover. Clearly, there was sufficient evidence to demonstrate the negligence of appellant's decedent.

The record patently illustrates that appellant received every procedural and substantive consideration to which it was entitled during the entire course of the trial. If there was any error, it was harmless as no substantial rights of appellant were prejudiced. The finding of the jury was plainly within the evidence presented as to liability and damages. Therefore, it is respectfully submitted that their findings in favor of the appellee should be affirmed.

Respectfully submitted,

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